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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK

FROM DECISIONS OF FEBRUARY 16, TO AND INCLUDING DECISIONS OF MAY 1, 1900.

WITH

NOTES, REFERENCES AND INDEX

By EDMUND H. SMITH,
STATE REPORTER.

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JUDGES OF THE COURT OF APPEALS.

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EDWARD T. BARTLETT,

ALBERT HAIGHT,

CELORA E. MARTIN,

IRVING G. VANN,

ASSOCIATE JUDGES.

JUDSON S. LANDON,

EDGAR M. CULLEN,

WILLIAM E. WERNER,

JUSTICES OF THE SUPREME COURT SERVING AS
ASSOCIATE JUDGES.*

* Designated by the Governor January 1, 1900, under section 7 of article VI of the Constitution, as amended in 1899.



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CASES DECIDED
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK,

COMMENCING FEBRUARY 27, 1900.

In the Matter of the Probate of the Last Will and Testament
of ISABELLA ANDREWS, Deceased.

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75 AD*409

JOHN R. KNOX, Executor, Appellant; JOHNSTON ANDREWS et
al., Respondents.

1. STATUTE OF WILLS — INTENTION OF LEGISLATURE GOVERNS CONSTRUCTION. The intention of the legislature, and not that of the testator, must govern the construction of the Statute of Wills (2 R. S. 83, § 40), and, if he fails to execute a will in conformity thereto, the court must condemn the instrument and can give no force to the fact that he honestly intended thereby to make a will.

2. WILL — WHEN NOT SUBSCRIBED AT THE END. A will, drawn upon a printed blank folded in the middle so as to make four consecutive pages, with the attestation clause at the top of the second page and executed at that point by the testator and the attesting witnesses, so that the first two pages together make a complete will, is not subscribed by the testator "at the end of the will," as required by statute, where the third page contains further material and complete dispositions of property in no manner connected with the first or second pages except that the third page is numbered "2nd page" and the second page "3rd page" — the draftsman having passed to the third page after he had filled the first.

3. DOCTRINE OF INCORPORATION LIMITED. The doctrine of incorporation cannot be successfully invoked to read into such a will the alleged second page, as the result would be to permit an evasion of the statute.

Matter of Andrews, 43 App. Div. 394, affirmed.

(Argued January 8, 1900; decided February 27, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered

October 6, 1899, affirming a decree of the Surrogate's Court of the county of Kings refusing to admit to probate the will of Isabella Andrews, deceased.

The facts, so far as material, are stated in the opinion.

George G. Reynolds for appellant. The testatrix and witnesses signed at the end of the will within the meaning of the statute. (*Sisters of Charity v. Kelly*, 67 N. Y. 415; Schouler on Wills, § 284; *Matter of Eagan*, N. Y. L. J., Jan. 19, 1893; *Tonnele v. Hall*, 4 N. Y. 144; *Hitchcock v. Thompson*, 6 Hun, 279; *Matter of Dayger*, 47 Hun, 127; *Matter of Singer*, 19 Misc. Rep. 679; *Matter of Stokes*, 31 L. T. Rep. 552; *Matter of Coombs*, L. R. [1 P. & D.] 302; *Matter of Kimpton*, 3 S. & T. 427.) Even if the "second page" is not, strictly speaking and on the face of it, a part of the body of the will which is ended and signed on the "third page," it is then to be considered testamentary matter, which, by its paging and its being joined to the will as it was while in the possession of testatrix, and when executed by her, is identified and demonstrated so far as to be deemed incorporated into it. (*Matter of Almosnino*, 1 S. & T. 508; *Matter of Watkins*, L. R. [1 P. & D.] 19; *Matter of Pascall*, L. R. [1 P. & D.] 606; *Van Straubenze v. Monck*, 3 S. & T. 12; *Tonnele v. Hall*, 4 N. Y. 144; *Brown v. Clark*, 77 N. Y. 369; *Caulfield v. Sullivan*, 85 N. Y. 155.)

Armour C. Anderson, special guardian, for infant legatees. While the statute requires the will to be signed at the end thereof, these words should be taken in their ordinary and popular signification; in other words, at the place where the testator intended to stop, not on the last or back page of the paper. (*Sisters of Charity v. Kelly*, 67 N. Y. 409; *People ex rel. v. Roosevelt*, 14 Misc. Rep. 536; *Tompkins v. Hunter*, 149 N. Y. 117; *Matter of Laudy*, 78 Hun, 479; *Younger v. Duffie*, 94 N. Y. 535; *Matter of Blair*, 84 Hun, 581; *Matter of Whitney*, 153 N. Y. 259; *Herter v. Mullen*, 159 N. Y. 40; *Matter of Dayger*, 47 Hun, 127; *Matter of Singer*,

19 Misc. Rep. 679.) Admitting that the statutory provision controls the manner of subscribing a will, the will in this instance was properly executed. It is signed at the end thereof. (*Gilbert v. Knox*, 52 N. Y. 125; *Younger v. Duffie*, 94 N. Y. 539; *Matter of Braddock*, L. R. [1 P. & D.] 433; *Rees v. Rees*, L. R. [3 P. & D.] 84.)

Frederic W. Adee for respondents. The paper propounded for probate is not subscribed or attested in the manner required by the Statute of Wills of the state of New York (2 R. S. 63, § 40). The refusal of the surrogate to admit the instrument offered to probate was correct. (*Willis v. Lowe*, 5 Notes of Cases, 428; *Matter of Parslow*, 5 Notes of Cases, 112; *Matter of Tookey*, 5 Notes of Cases, 386; *Ayres v. Ayres*, 5 Notes of Cases, 375; *Sweetland v. Sweetland*, 4 S. & T. 6; *Smee v. Bryer*, 6 Moore P. C. 404; *Matter of Powell*, 4 S. & T. 34; *Matter of Wright*, 4 S. & T. 35; *Matter of Coombs*, L. R. [1 P. & D.] 302 [1866]; *Matter of Wray*, 31 Wkly. Rep. 476.) Strict adherence to the provisions of the Statute of Wills prescribing the manner of their execution has always been required by the courts of this State. (*Dennett v. Taylor*, 5 Redf. 561; *McCord v. Lounsbury*, 5 Dem. 68; *Sisters of Charity v. Kelly*, 67 N. Y. 409; *Matter of O'Neil*, 91 N. Y. 516; *Matter of Conway*, 124 N. Y. 455.) No evidence upon probate can remove the fatal defects in subscription and attestation contained in the propounded instrument. (*Matter of Hewitt*, 91 N. Y. 261.) The doctrine of incorporation, ineffectually evoked on behalf of the proponent in both of the lower courts, has no bearing upon the case on appeal. (*Matter of O'Neil*, 91 N. Y. 516; *Matter of Conway*, 124 N. Y. 455; *Booth v. Baptist Church*, 126 N. Y. 215; *Matter of Whitney*, 153 N. Y. 259; *Dennett v. Taylor*, 5 Redf. 561; *Tonnele v. Hall*, 4 N. Y. 140.) The question presented is not an open one in this court. The statute has always been strictly construed, and the will must be a completed whole, signed by the testator and witnesses at the end thereof. (*Matter of Conway*, 124 N. Y. 455; *Mat-*

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ter of Blair, 152 N. Y. 645; *Matter of Whitney*, 153 N. Y. 259; *Matter of Hewitt*, 41 N. Y. 261; *Matter of O'Neil*, 91 N. Y. 516.)

BARTLETT, J. This case comes before us under circumstances so unusual that a few words of comment may not be out of place.

The surrogate of Kings county refused probate to the will we are about to consider, on the ground that it was not subscribed at the end thereof, as required by the Statute of Wills. (2 R. S. 63, § 40; 2 Banks' 9th Edition, p. 1877.) In so doing, he followed the settled law of this court for years, and many well-reasoned English cases, when construing a statute similar to our own. (1 Vict. ch. 26.)

The learned Appellate Division affirmed the surrogate's decree with a divided court, giving utterance at the same time to a protest both emphatic and unanimous.

The opinion states that the conclusion reached was solely under the stress of authority, and that, unaided by the light of judicial decisions, a contrary result would have followed. One of the dissenting justices stated that while he recognized the principle of *stare decisis*, cases sometimes arise when a judge is justified in refusing to follow a decision of the court of last resort. The other dissenting justice wrote an opinion in which he succeeded in reaching the conclusion that neither the Statute of Wills, nor the cases which had compelled the majority of his brethren to reluctantly affirm the surrogate's decree, called for any such result.

As the opinion of the Appellate Division concedes that the question presented is not an open one in this court, we might well content ourselves with an affirmance of the judgment did we not feel constrained by judicial courtesy to re-examine the legal situation that has been so pointedly called to our attention.

It has long been the settled policy of this state to require certain formalities to be observed in the execution of wills; these provisions are exceedingly simple, and calculated to pre-

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vent frauds and uncertainty in the testamentary dispositions of property. (*Matter of O'Neil*, 91 N. Y. 520; *Willis v. Lowe*, 5 Notes of Cases, 428.)

Section 40 (2 R. S. 63; 2 Banks' 9th Ed. p. 1877) reads as follows: "Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner: 1. It shall be subscribed by the testator at the end of the will: 2. Such subscription shall be made by the testator, in the presence of each of the attesting witnesses, or shall be acknowledged by him, to have been so made, to each of the attesting witnesses: 3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed, to be his last will and testament. 4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator."

These are the only restrictions imposed upon a testator when executing his will and they appear to be wise, reasonable and easily understood.

It has been repeatedly laid down as the rule in this state, in cases we shall presently discuss, that the intention of the testator is not to be considered when construing this statute, but that of the legislature. The question is not what did the testator intend to do, but what has he done in the light of the statute.

It is undoubtedly true that from time to time an honest attempt to execute a last will and testament is defeated by failure to observe some one or more of the statutory requirements.

It is better this should happen under a proper construction of the statute than that the individual case should be permitted to weaken those provisions calculated to protect testators generally from fraudulent alterations of their wills.

It may be well, before examining the will which is the subject of this appeal, to refer to a few of the cases which construe the provision of the statute requiring the testator and the witnesses to subscribe at the end of the will.

In *Sisters of Charity v. Kelly* (67 N. Y. 409) it was held that the provision of the statute requiring the testator to subscribe "at the end of the will" means the end of the instrument as a completed whole, and where the name is written in the body of the instrument, with any material portion following the signature, it is not properly subscribed, nor can it be claimed that the portion preceding the signature is valid as a will.

In *Matter of O'Neil* (91 N. Y. 516) a printed blank was used and the formal commencement was printed on the first page and the formal termination printed at the foot of the third page. The entire blank space was filled with writing and apparently for want of room a portion of a paragraph containing material provisions was carried over to and the paragraph finished at the top of the fourth page; the two portions were not, however, sought to be connected by means of a reference or anything indicating their relation to each other. The name of the testator was written at the end of the printed form and the names of the witnesses written below the formal attestation clause on the third page. This court held that there was no legal subscription of the will and affirmed the judgment denying probate.

Chief Judge RUGER, who wrote the opinion of the court, said: "While the primary rule governing the interpretation of wills, when admitted to probate, recognizes and endeavors to carry out the intention of the testator, that rule cannot be invoked in the construction of the statute regulating their execution. In the latter case courts do not consider the intention of the testator, but that of the legislature. * * * The statute fixes an inflexible rule, by which to determine the proper execution of all testamentary instruments. * * *

"It will be seen in all of the cases cited there was no reason to doubt the testator's intention to make a valid disposition of his property, and yet in each case the will was denied probate, because in the execution thereof the testator did not conform to the provisions of the statute, in failing to place his signature at the physical end of the will."

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In *Matter of Conway* (124 N. Y. 455) a blank form was used, the whole of which was upon one side of the paper. A space was left for the dispositions to be made, preceded by the words "I give, devise and bequeath my property as follows." The blank space was filled up by three complete devises; at the end of the last was underlined, in parenthesis, the words "carried to back of will." Upon the back of the sheet was written the word "continued;" following it were various bequests and then the words "signature on face of the will." The signature of the testator appeared at the end of the testimonium clause on the face of the paper and those of the witnesses under the attestation clause. It was held by the Second Division of this court that there was not such a subscription and signing by the testator as required by the statute, and that the will had been improperly admitted to probate.

Judge PARKER, in delivering the opinion of the court, said: "The aim of the statute is to prevent fraud; to surround testamentary dispositions with such safeguards as will protect them from alteration."

The learned judge also declared in substance that the admitted intention of the testator that the provisions appearing on the page following his signature should form a part of his will, would in no way affect the question before the court.

In *Matter of Whitney* (153 N. Y. 259) it was held that a will drawn upon a printed blank covering only one page, and signed by the testator and subscribing witnesses at the foot of the page, is not subscribed by the testator at the end of the will, as required by the statute, when the blank space in the printed form is filled up by subdivisions marked, respectively, "First" and "Second," followed by the words "See annexed sheet," and additional subdivisions marked, respectively, "Third" and "Fourth," are written on a separate piece of paper attached to the face of the blank, immediately over the first and second subdivisions, by removable metal staples. It was held that the question presented was not an open one in this court, and that the will was not legally subscribed.

The court again approved the doctrine that the existence of

good faith did not affect the question pending, as the intention of the legislature, and not that of the testator, governed.

In *Matter of Blair*, reported in 84 Hun, 581, this court affirmed the judgment of the General Term, first department, on the opinion below, which reversed a decree of the Surrogate's Court admitting the will to probate. This instrument consisted of eight pages. The testator signed at the bottom of the seventh page, and the witnesses signed at the end of a proper witnessing clause at the top of the eighth page. After the place for the signatures of the witnesses, but before they were actually signed or the will executed, a clause was added directing the executor to sell at private sale a certain piece of real estate, and to devote the proceeds of sale to liquidating any deficiency in interest or cash bequests under the will. The will was then executed, as before stated, and the testator signed the added clause, but the witnesses did not. (152 N. Y. 645.)

In each of the cases cited, it was very clear that the will was not legally subscribed, and that to have admitted it to probate, by yielding to the suggestion that it was an honest attempt to make a will, would have been a practical repeal of the statute as to subscription at the end of the instrument.

Our present Statute of Wills, requiring that a will should be subscribed at the end thereof, is similar to 1 Victoria, ch. 26, which was in force in England from 1837 until 1853, when it was amended by 15 and 16 Victoria, ch. 24, known as "Lord St. Leonard's Act." Prior to this amendment, the English courts construed the act as strictly as our own have the present Statute of Wills. (*Willis v. Lowe*, 5 Notes of Cases, 428; *Re Parslow*, Id. 112; *Re Tookey*, Id. 386; *Ayres v. Ayres*, Id. 375; *Sweetland v. Sweetland*, 4 Swabey & Tristram, 6; *Smee v. Bryer*, 6 Moore's P. C. Cases, 404.) In the latter case, Lord LANGDALE, delivering the opinion of the court, said at page 410: "It may happen, even frequently, that genuine wills, namely, wills truly expressing the intentions of the testators, are made without observation of the required forms, and whenever that happens, the genuine

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intention is frustrated by the act of the legislature, of which the general object is to give effect to the intention. The courts must consider that the legislature, having regard to all probable circumstances, has thought it best, and has, therefore, determined to run the risk of frustrating the intentions sometimes, in preference to the risk of giving effect to, or facilitating, the formation of spurious wills, by the absence of forms. It is supposed, and that authoritatively, that the evil of defeating the intention in some cases, by requiring forms, is less than the evil probably to arise by giving validity to wills made without any form in all cases."

The reasoning of our own and the English courts finds support in two states where the Statute of Wills is substantially the same as in New York. (*Hays v. Harden*, 6 Penn. St. 409; *Glancy v. Glancy*, 17 Ohio St. 134.)

We come, then, in view of the law as it now stands, to the will before us.

The testatrix was an unmarried woman, aged about sixty years; she left her surviving no nearer relatives than first and second cousins; no part of her estate is given to any relative; a stranger to her blood is sole executor; the will is in his handwriting, and the proceeds of sale of testatrix's house and lot in Brooklyn are given one-half to him and one-half divided equally between two religious societies. In addition to this the testatrix gave eight money bequests, four to religious societies and a cemetery and the others to persons not of her blood. These bequests aggregate about \$4,200.00.

The residuary clause is as follows: "The rest, residue and remainder of my estate I give unto my executor, to make disposition of and divide in such manner as he in his judgment may deem best and proper."

No undue influence is charged.

The estate is estimated at about fifteen thousand dollars. The will was drawn on a printed blank, being one piece of paper, consisting of a sheet of four pages, the two leaves of which were joined from top to bottom on the left side.

The formal opening part of the will is printed on the top

of the first page, leaving the rest of that page blank; the closing part, containing the clause for the appointment of the executor, and that which follows, including the attestation clause, was printed on the top of the second page of the first leaf, leaving the rest of that page and both pages of the second leaf blank. The draftsman filled the blank on the first page and then turned to the first page of the second leaf, being the third page of the blank, and filled that, marking it at the top "2nd page." He then turned to the second page of the first leaf, containing the closing part of the will as before stated, in print, marked it at the top "3rd page" and completed the instrument, save as to its execution, by filling the blanks at the top of that page, except the blank for the date, which was left to be filled in at the time of execution.

It is to be observed that a complete will was made out on the two sides of the first leaf, being the first and second pages of the blank; all of the first side of the third leaf, marked "2nd page" could have been written after execution, as no sentence thereof is continued from the first page of the will, nor carried over to the alleged third page thereof. The fourth page of the blank could have been written over in the same way.

The first page of the will contains the money legacies, the direction to sell the real estate and divide the proceeds and two legacies of personal property.

The alleged second page of the will contains bequests of personal property and the residuary clause.

We have here on one entire piece of paper, folded so as to make four pages, a complete will so far as form goes, on the first and second pages, and then follows on the third page of the blank and after the signatures of testatrix and witnesses on the second page of the blank a page marked "2nd page," not connected with the will proper in any way, but complete by itself.

The question is not whether from the proofs in this case the page following the signatures of the will is in fact a part of testatrix's will by reason of her established intention, but is

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the instrument so drawn, subscribed at the end thereof as the statute commands.

We are of opinion that it is not legally subscribed, and that to hold otherwise would open the door to gross fraud and be contrary to the statute and the settled law.

It was suggested on the argument of this case that the effect of the Statute of Wills, as strictly construed by this court, is to defeat the intention of many testators, while the fraudulent addition to wills was a crime of rare occurrence.

The fallacy of this argument consists in overlooking the fact that the number of frauds prevented by our wise and simple statute can never be known.

We might as well ask how many commercial crimes have been prevented by the Statute of Frauds.

The case at bar is one of the strongest illustrations of the wisdom of the Statute of Wills that has ever come to the attention of this court.

With a complete will on the first and second pages of a blank containing four pages, there is nothing to prevent filling up the vacant third and fourth pages with any number of additional provisions, including, as in this case, a residuary clause allowing an executor to dispose of the residue in such manner as he deemed proper.

The defeat of testamentary intention in a few cases is not due to the statute, or the construction of it by the courts, but to the fact that scriveners and other laymen, ignorant of the simple and clear provisions of the statute, are permitted to draw wills.

It is urged with much ability, by the learned senior counsel for the appellants, that the alleged second page of this will can be read into it by invoking the doctrine of incorporation as established in England and, to some extent, in this state.

We are of opinion that, under the facts here disclosed, that doctrine has no application; if it were otherwise, the evasion of the statute would be so easily accomplished as to render its repeal unnecessary.

We have to say in conclusion that it is quite possible we

have given to this appeal undue importance, involving, as it does, a question of law settled in this court, but we desire to express in the most emphatic manner our approval of the Statute of Wills as now construed.

The order appealed from should be affirmed, with costs to respondent and special guardian to be paid out of the estate.

PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, MARTIN and VANN, JJ., concur.

Order affirmed.

CHARLES F. SCHOEPFLIN, Respondent, v. MICHAEL J. COFFEY, Appellant.

1. LIBEL — QUESTION OF INSUFFICIENCY OF COMPLAINT CANNOT BE RAISED FOR FIRST TIME ON APPEAL. *It seems*, that a complaint which, after stating slanderous words alleged to have been spoken by the defendant in the presence of certain reporters, alleges that "*thereby*" the defendant caused such statements to be printed and published, and which contains no direct allegation that he caused them to be printed and published, does not allege a cause of action against him for libel; but as the question of its insufficiency was not presented by any proper objection or exception in the court below, it cannot be raised for the first time in the Court of Appeals.

2. SPEAKING WORDS WHICH ANOTHER PUBLISHES. The mere speaking of words in the presence of third persons that are not actionable *per se* and which at most would amount to a mere slander, even if special damages were alleged, is not the proximate cause of an injury alleged to have been sustained by their subsequent publication in newspapers by such persons when he who utters them, in no manner procured, requested, commanded or induced their printing, and he cannot be made responsible therefor in an action for libel.

3. EVIDENCE — SUFFICIENCY TO SHOW CONNECTION WITH PUBLICATION OF LIBEL. Where the evidence in an action for libel, at most, only establishes that a person whom defendant knew to be a reporter asked him as to a report which was in circulation concerning the matters alleged in the complaint, stating that he understood that defendant had asserted the facts which were subsequently published, and the latter admitted having done so, there being no proof that the latter's statement was made for publication, nothing having been said on the subject, and there being other evidence tending to show that defendant did not intend that it should be published and had no design to procure its publication, the refusal of the trial court to grant a nonsuit or to direct a verdict for

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defendant is reversible error, upon the ground that the proof was insufficient to establish a cause of action against him for libel.

4. RECORD ON APPEAL. - The Court of Appeals is confined to and controlled by the record on appeal and cannot correct even an obvious error, contained in an exception appearing upon a record, which, if imperfect, should have been corrected by the appellant.

5. SUFFICIENCY OF EVIDENCE. A mere conjecture or suspicion that defendant in an action for libel communicated slanderous statements to another, for the purpose of their publication, is not enough to authorize the submission of the question as one of fact to a jury, since a mere scintilla of evidence is not sufficient.

6. EVIDENCE OF PLAINTIFF'S CONSENT TO PUBLICATION OF LIBEL. Upon the trial of an action for libel, an exception by defendant to the striking out of evidence received without objection, that the alleged libelous articles were printed and published with plaintiff's consent, is well taken, as defendant was entitled to have it retained in the case and considered by the jury.

7. CAUSE OF ACTION — PENAL CODE, § 254a. An action framed as one for libel, but which cannot be maintained as such, cannot be sustained as an action under section 254a of the Penal Code, declaring that one who willfully makes to an employee of a publisher of a newspaper a statement concerning any person, which if published therein would be a libel, is guilty of a misdemeanor.

Schoepflin v. Coffey, 25 App. Div. 488, reversed.

(Argued January 24, 1900; decided February 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered February 21, 1898, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

John Cunneen for appellant. The defendant's motion to dismiss the complaint at the beginning of the trial should have been granted, as the complaint alleged no cause of action. (*Laidlaw v. Sage*, 158 N. Y. 73; *Ward v. Weeks*, 7 Bing. 211; *Olmsted v. Brown*, 12 Barb. 657; *Bassell v. Elmore*, 48 N. Y. 564; *Fowles v. Bowen*, 30 N. Y. 20; *Terwilliger v. Wands*, 17 N. Y. 57; *Raines v. N. Y. P. Co.*, 92 Hun, 515.) There was no amendment of the pleadings upon the

trial, and the learned judge erred in submitting the action to the jury as one of libel, as there was no allegation in the complaint that the plaintiff had published the article complained of. (*Stevens v. Mayer*, 84 N. Y. 296; *Arnold v. Angell*, 62 N. Y. 508; *Hollister v. Englehart*, 11 Hun, 446.) One is not liable for the consequences of his own wrong caused by the act of another, even though the original wrongdoer "intended and expected and contemplated" such result. (*Robertson v. N. Y. P. Co.*, 2 App. Div. 49.)

Norris Morey for respondent. There was a cause of action for libel stated in the complaint and proved by the evidence. (*Fowles v. Bowen*, 30 N. Y. 20; *Titus v. Sumner*, 44 N. Y. 266; *Turton v. N. Y. R. Co.*, 144 N. Y. 144; *Moore v. Francis*, 121 N. Y. 199; *Mattice v. Wilcox*, 147 N. Y. 624; Townshend on Slander & Libel, §§ 180, 181; *Hamilton v. Eno*, 81 N. Y. 116; *Johnson v. Synett*, 89 Hun, 192; *Shelby v. S. P. & P. Assn.*, 38 Hun, 474; *Morey v. M. J. Assn.*, 123 N. Y. 207.) The allegation of the complaint, that the defendant originated and furnished the libel and caused its publication, is the legal equivalent of an allegation that he published it. What one causes to be done by or through another is done by himself. (*Thomas v. Rumsey*, 6 Johns. 26; *Dole v. Lyon*, 10 Johns. 447; *Hamilton v. Eno*, 81 N. Y. 116; *Youmans v. Smith*, 153 N. Y. 214; Odgers on Libel & Slander, 155, 157; Townshend on Libel & Slander, §§ 104, 115; *Clay v. People*, 86 Ill. 147; *Miller v. Butler*, 6 Cush. 71; *Loibel v. Breidenbach*, 78 Wis. 49; *Adams v. Kelly*, R. & M. 157; *Bond v. Douglass*, 7 C. & P. 626.) The falsity of the libel was presumed, and no evidence thereof was required. (*Hunt v. Bennett*, 19 N. Y. 173; *Klinck v. Colby*, 46 N. Y. 427; *Byam v. Collins*, 111 N. Y. 150; *Bergmann v. Jones*, 94 N. Y. 51; *Warner v. P. P. Co.*, 132 N. Y. 181; *Holmes v. Jones*, 147 N. Y. 59; *Smith v. Matthews*, 152 N. Y. 152; *Karwowski v. Pitass*, 20 App. Div. 118.) The question as to whether the libel was wantonly, carelessly, recklessly, maliciously, or in bad faith caused to be published by the

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defendant, and whether the plaintiff was entitled to punitive damages, was wholly and peculiarly a question for the jury. (*Byam v. Collins*, 111 N. Y. 150; *Holmes v. Jones*, 121 N. Y. 467; *Smith v. Matthews*, 152 N. Y. 152.)

MARTIN, J. This action was for both slander and libel. The complaint contains five counts. The first and fifth are for libel and the remainder for slander. Upon the trial the court held that the complaint did not state a cause of action for slander, as the words alleged were not actionable *per se* and no special damages were averred. From this determination no appeal was taken. The case was, however, submitted to the jury as an action for the libel charged in the first and fifth counts of the complaint.

These counts in substance charge that on the fifteenth day of May, 1895, at Albany, the defendant maliciously spoke and published concerning the plaintiff the false and defamatory words following: "An indictment has been issued against Schoepflin (meaning this plaintiff) by the grand jury of Albany county in connection with Campbell's ice bill, and a warrant is out for his arrest;" "I know that an indictment has been found against Schoepflin (meaning this plaintiff) by the grand jury in connection with Campbell's ice bill, from the best authority in the world; I would gamble on it," meaning and declaring thereby that he knew the grand jury of Albany county had found an indictment against the plaintiff, who was then a member of the legislature, for corrupt and criminal conduct in connection with a bill which had been introduced and was pending in the assembly; that such statements were made in the presence of G. Edward Graham, and in the presence of G. Edward Graham and Lewis J. Seabold; and that Graham was the manager of the Associated Press at Albany, and Seabold was a reporter and news-gatherer for the New York World. It then averred, "and thereby defendant caused said false and defamatory statement to be printed and published in most of the daily newspapers of the state of New York and in the said New York World."

The first question argued was whether the complaint alleged a cause of action against the defendant for libel. It is to be observed that after stating the slanderous words which were alleged to have been spoken in the presence of Graham and Seabold, and the fact that they were reporters, the plaintiff alleges that *thereby* the defendant caused those statements to be printed and published. The complaint contains no direct allegation that the defendant caused them to be printed and published, but after stating certain premises which included the speaking of the words in the presence of the reporter and manager of the Associated Press, it is averred as a conclusion from the preceding allegations, but not as a fact, that the defendant thereby caused the statements to be printed and published. Obviously, the word "thereby" was used in the sense of by that means, or in consequence of the preceding allegations, and, hence, the averment was of a conclusion as to the effect or result of the facts previously alleged. If they were untrue, the plaintiff could not be convicted of perjury for falsely alleging and verifying an averment that the defendant caused the statements made by him to be printed and published, as he made no such allegations, but merely stated his deduction from the preceding facts. Obviously the complaint contains no sufficient allegation that the defendant caused the printing or publication of the words spoken, to constitute a cause of action against him for libel.

We have, however, searched the record in vain to find any proper objection or exception which enables the defendant upon this appeal to avail himself of the insufficiency of the complaint. To raise that question it was necessary that an objection to its sufficiency should have been taken, and the ground upon which it was claimed to be insufficient should have been brought to the attention of the court. It is not a fatal objection on appeal that the cause was tried outside the pleadings in the absence of some specific objection to that course. Parties may, if they so elect, depart from the issues made by the pleadings and try other questions relating to the merits of the controversy by consent or acquiescence.

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(*Farmers' L. & T. Co. v. Housatonic R. R. Co.*, 152 N. Y. 251.) As the question of the sufficiency of the complaint was not properly raised in the court below, it cannot be raised here for the first time.

The next question presented is whether the proof was sufficient to justify the court in submitting to the jury the question whether the defendant caused or procured the publication of the alleged libel. In discussing this question, we shall assume that a person who requests, procures or directs another to publish a libel, or connives at or assists in its publication, is liable therefor. But to justify a jury in finding a defendant liable for such publication, there must be some evidence that it was procured by him, or that he was guilty of some affirmative act which secured or induced it. The mere speaking of words in the presence of third persons that are not actionable *per se* would at most amount to a mere slander, even if special damages were alleged, and their repetition or the printing and publication of them by the independent act of a third party, would not render the person speaking them responsible therefor.

It is too well settled to be now questioned that one who utters a slander, or prints and publishes a libel, is not responsible for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control and who thereby make themselves liable to the person injured, and that such repetition cannot be considered in law a necessary, natural and probable consequence of the original slander or libel. (Newall on Defamation, 245; Moak's Underhill on Torts, 145; *M'Gregor v. Thwaites*, 3 B. & C. 35.) The remedy in such a case would be against the party who printed and published the words thus spoken, and not against the one speaking them, as a person is not liable for the independent illegal acts of third persons in publishing matters which may have been uttered by him, unless they are procured by him to be published, or he performed some act which induced their publication. (*Ward v. Weeks*, 7 Bing. 211; *Olmsted v. Brown*, 12 Barb. 657.) The repetition of defamatory

language by another than the first publisher is not a natural consequence of the first publication, and, therefore, the loss resulting from such repetition is not generally attributable to the first publisher. This rule is based upon the principle that every person who repeats a slander is responsible for the damage caused by such repetition, and that such damage is not the proximate and natural consequence of the first publication of the slander. (*Bassell v. Elmore*, 48 N. Y. 564; *Fowles v. Bowen*, 30 N. Y. 20; *Terwilliger v. Wands*, 17 N. Y. 57, 58; *Laidlaw v. Sage*, 158 N. Y. 73.)

In the latter case the question of proximate cause was considered, and it was held that it was applicable to actions of tort, and that the proximate cause of an event was that which in a natural and continuous sequence, unbroken by any new cause, produces the event complained of, and without which it would not have occurred. Applying the principle of those cases to the question under consideration, it becomes obvious that the speaking of the words by the defendant was not the proximate cause of the injury the plaintiff sustained by reason of their publication in the various newspapers of the state. We have examined the case of *Youmans v. Smith* (153 N. Y. 214), which is so firmly relied upon by the plaintiff, but do not find any principle decided there which is in conflict with the doctrine already stated. There the person who ordered the matter printed informed the printer that he desired it for the purpose of circulation. Under those circumstances it was held that the printer was liable.

The record in this case seems to be entirely barren of proof that the defendant in any way procured, requested, commanded or induced the printing of the matters set forth in the complaint. The most that was established was that a person whom the defendant knew to be a reporter asked him as to a report which was in circulation concerning the matters alleged in the complaint, stating that he understood the defendant had asserted the facts, which were subsequently published, and the latter admitted having done so. There is, however, no proof that his statement was made for publication, but, on

the contrary, the proof was that nothing was said upon the subject. There is also other evidence of the defendant which tends to show that he did not intend that it should be published and had no design to procure its publication. We are of the opinion that the court erred in denying the defendant's motion for a nonsuit, and in not directing a verdict for him upon the ground that the proof was insufficient to constitute a cause of action against him for libel.

On the trial the learned judge charged the jury to the effect that the plaintiff had testified that the defendant admitted that he made the statements alleged *for* publication by the Associated Press, and submitted that supposed evidence to it upon the question as to the defendant's having procured the publication of the articles complained of. No such evidence is contained in the record. It is manifest from the opinion of the Appellate Division that it found no such proof. To this portion of the charge the defendant excepted. The exception, as printed in the record, is apparently meaningless. That the appellant is right in his contention that the words "denial" and "indictment" therein were not the words used in taking the exception, but that "effect" and "admission" were those employed there can be little doubt. The respondent, while claiming that the exception must be considered as it is printed in the record, does not deny that these errors exist. Still, as we are confined to, and must be controlled by, the record, which, if imperfect, should have been corrected by the appellant, those errors in the charge are not before us, although they were considered by the court below. We cannot, however, assent to the conclusion of that court upon the question.

It seems doubtful if the trial court would have submitted the case to the jury except for its misapprehension as to the admission of the defendant, as without that supposed evidence the proof was insufficient to permit a legitimate inference by the jury that the communication by the defendant was made for the purpose of its publication by the Associated Press. It may be conjectured or suspected that he thought it

might be published, but that was not sufficient to make him liable. It is not enough to authorize the submission of a question as one of fact, to a jury, that there is a scintilla of evidence or a mere surmise, and where the jury, at most, could only conjecture that the act was performed by the defendant for that purpose it should be withheld from it. "Insufficient evidence is, in the eye of the law, no evidence." "The law demands proof, and not mere surmises." (*Baulec v. N. Y. & H. R. R. Co.*, 59 N. Y. 356, 366; *Pollock v. Pollock*, 71 N. Y. 137, 153; *Bond v. Smith*, 113 N. Y. 378, 385; *Cordell v. N. Y. C. & H. R. R. Co.*, 75 N. Y. 330; *Dubois v. City of Kingston*, 102 N. Y. 219; *Pauley v. S. G. & L. Co.*, 131 N. Y. 90, 98.)

Proof was given upon the trial which tended to show that the articles printed and published in the several newspapers were sent out by the manager of the Associated Press with the consent and by the authority of the plaintiff. After this evidence had been received without objection, it was stricken out by the court and the defendant excepted. If the plaintiff consented to or authorized the publication complained of, he cannot recover for any injury sustained by reason of the publication he authorized. We think the defendant was entitled to have this evidence retained in the case and considered by the jury, and that his exception to the action of the court in striking it out was well taken.

The learned Appellate Division held, and the respondent still insists, that even if this action cannot be maintained as an action for libel, it may be sustained as an action under section 254a of the Penal Code. That section provides: "Any person who willfully states, delivers or transmits by any means whatever to any manager, editor, publisher, reporter or other employee of a publisher of any newspaper, magazine, publication, periodical or serial any statement concerning any person or corporation which, if published therein, would be a libel, is guilty of a misdemeanor." The answer to this proposition is that no such action was stated in the complaint or intended by the plaintiff. If we were to assume that the prohibition

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of this statute conferred upon a person against whom a libel was directed, authority to bring an action for the wrong prohibited, still, it would be quite remarkable if the plaintiff could commence an action for a cause which exists by virtue of the common law, and recover upon an entirely different one existing, if at all, under the statute. We think the judgment cannot be sustained upon that ground.

The judgment should be reversed and a new trial granted, with costs to abide the event.

VANN, J. I concur in the result because the defendant was entitled to have the evidence, tending to show that the article in question was sent out by the manager of the Associated Press with the consent of the plaintiff, retained in the record and considered by the jury. I dissent from the conclusion that the evidence, which tended to show that the defendant uttered the injurious words to a newspaper reporter, in response to questions put by him, when he knew him to be a reporter, and, although acquainted with him for years, had never conversed with him except as a collector of news for publication, presented no question for the jury as to whether he intended to cause or promote the publication of the words spoken under the circumstances mentioned.

PARKER, Ch. J., GRAY, BARTLETT, CULLEN and WERNER, JJ., concur with MARTIN, J., and VANN, J., concurs in result in memorandum.

Judgment reversed, etc.

NORMAN GETMAN et al., as Administrators of JOHN A. SHOEMAKER, Deceased, Respondents, v. THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Appellant.

1. CONTRIBUTORY NEGLIGENCE — MISTAKE OF JUDGMENT IN IMMINENT PERIL. Upon the trial of an action against a railroad company for damages for the death of plaintiff's intestate occurring at one of its crossings, that deceased was in a position of imminent danger is not sufficiently established where the undisputed evidence shows that he was in good health, entirely familiar with the crossing, was driving a gentle

horse at a walk, or slow trot, and saw the train by which he was struck approaching at a speed of from forty to fifty miles an hour when it was still two hundred feet from the crossing, and when the head of his horse was within six feet of the nearest rail, there being nothing in the surroundings to confuse him, and the circumstances indicating that he first intended to jump from the wagon and then changed his mind and whipped up his horse, intending to cross in front of the train; and a charge to the jury stating the legal principle applicable to a mistake of judgment, committed by one placed in such a position by the negligence of another, is reversible error, as it permits a finding that the deceased was free from contributory negligence, when the evidence does not.

2. BURDEN OF PROOF. The burden is upon plaintiffs, in an action to recover for the negligent killing of their intestate, to show that the latter acted with reasonable care under the circumstances.

Getman v. D., L. & W. R. R. Co., 87 App. Div. 630, reversed.

(Argued January 18, 1900; decided February 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 31, 1899, affirming a judgment in favor of plaintiffs entered upon a verdict, and an order denying a motion for a new trial.

This action was brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by the negligence of the defendant.

The facts, so far as material, are stated in the opinion.

William Kernan and *Leslie W. Kernan* for appellant. Plaintiffs' intestate was guilty of carelessness and negligence which caused the accident. This was shown by all the evidence, and there was no evidence to the contrary. The court should have so held when requested by the counsel for the defendant. (*Wilcox v. R., W. & O. R. R. Co.*, 39 N. Y. 358; *Reynolds v. N. Y. C. & H. R. R. Co.*, 58 N. Y. 248; *Heaney v. L. I. R. R. Co.*, 112 N. Y. 122; *Cullen v. D. & H. C. Co.*, 113 N. Y. 667; *Rodrian v. N. Y., N. H. & H. R. R. Co.*, 125 N. Y. 526; *Moore v. N. Y. C. & H. R. R. Co.*, 42 N. Y. S. R. 489; *Bates v. N. Y. C. & H. R. R. Co.*, 84 Hun, 287; *Durkee v. D. & H. C. Co.*, 88 Hun, 471; *Du Bois v. N. Y. C. & H. R. R. Co.*, 88 Hun, 10; *Martin v. N. Y. C. & H. R. R. Co.*, 50 N. Y. S. R. 553.)

A. B. Steele for respondents. The plaintiffs' intestate was not guilty of contributory negligence. The circumstances surrounding the accident were such that that question was one of fact for the jury, and the jury found for the plaintiffs. (*Casey v. N. Y. C. & H. R. R. Co.*, 78 N. Y. 518; *Ernst v. Hudson River R. R. Co.*, 39 N. Y. 61; *Kissenger v. N. Y. & H. R. R. Co.*, 56 N. Y. 538; *Kane v. N. Y., N. H. & H. R. R. Co.*, 132 N. Y. 160; *Oldenburg v. N. Y. C. & H. R. R. Co.*, 124 N. Y. 414; *Palmer v. N. Y. C. & H. R. R. Co.*, 112 N. Y. 234; *Smedis v. B. & R. B. R. Co.*, 88 N. Y. 13; *Schafer v. Mayor, etc.*, 154 N. Y. 466; *Judson v. C. V. R. R. Co.*, 158 N. Y. 597; *Branch v. N. Y. C. & H. R. R. Co.*, 39 App. Div. 435; *Wieland v. D. & H. C. Co.*, 30 App. Div. 85.) Plaintiffs' intestate not being guilty of contributory negligence, and being unable to discover the approach of the train until he arrived at the west side of the depot where he was in a dangerous position, he was not required to use the same accurate judgment that he would have been required to use had he not been in a dangerous place. (*Smith v. N. Y. C. & H. R. R. R. Co.*, 4 App. Div. 493; *Richardson v. N. Y. C. R. R. Co.*, 45 N. Y. 846; *Heath v. G. F. R. R. Co.*, 90 Hun, 560; *Zwack v. N. Y., L. E. & W. R. R. Co.*, 160 N. Y. 362; *Judson v. V. C. R. R. Co.*, 158 N. Y. 597; *Finn v. D., L. & W. R. R. Co.*, 42 App. Div. 524.)

LANDON, J. The plaintiffs' intestate, John A. Shoemaker, on the 26th day of August, 1896, at about seven o'clock in the evening, but while it was still broad daylight, in attempting to cross the single track of the defendant's main line of railroad near its station at South Columbia, Herkimer county, was struck by defendant's fast passenger train and killed.

In view of the verdict in favor of the plaintiffs and the affirmance by the Appellate Division of the judgment entered thereon, the appeal brings before us but the single question whether upon the undisputed evidence touching the intestate's action upon that occasion, it was error for the trial court to

permit the jury to find that the intestate was free from negligence contributing to his own death.

This situation is presented by the uncontradicted evidence.

The plaintiffs' intestate, Shoemaker, was a farmer, fifty-two years of age, in good health and entirely familiar with this crossing. The crossing was formed by a single track of the defendant's main line of railroad running northerly and southerly over the highway at nearly right angles. Shoemaker was seated upon a milk can in an open wagon drawn by a single horse, old and slow, which he was driving. His horse was either walking or slowly jogging along. As he was nearing the crossing the defendant's passenger train was approaching it from the north at a speed of from forty to fifty miles an hour. The defendant's passenger and freight station was also to the north of him, the end next to him being about thirty feet from his right hand. This station was 76 feet long and 20 feet wide, parallel to the main track, its front side fifteen and one-half feet distant from the rail next to it. A bay window projected three and one-half feet from about the middle of the front. We must assume that without fault of his own the intestate did not see or hear the approaching train until he had nearly passed the south end of the station. He was warned of his danger by the shouts of a man and boy, but we must assume he did not hear them. When the head of his horse was within six feet of the rail next to him he was seen to look toward the coming train, which, from his position, looking past the corner of the station and the projecting bay window he could then see rapidly approaching, probably about 200 feet from the crossing. He rose from his seat, stood up, seemed as if about to jump from his wagon, but instead of doing so changed his lines from one hand to the other and struck his horse several times with his whip. His horse increased its speed somewhat and crossed the track, but not far enough along to take him out of the reach of the train. It struck and killed him.

The learned trial court charged the jury, the defendant's counsel excepting to the charge as inapplicable to the case,

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that "Where one person without fault upon his part, through the carelessness of another, is placed in a position of imminent danger, the law does not exact from him the same cool and deliberate judgment which it would require from him if he had time to consider, and was placed in no peril. * * * If there were, for instance, open to him at that instant two possible causes of action, one to try to turn his horse around, or stop it and keep it off the track, and the other one to try and urge it across the track and get over before the train could strike him," then if the intestate used his best judgment in adopting the latter course it was for the jury to determine whether he was careless.

It is clear that the intestate was not in imminent peril, unless when he saw the near approaching train, he should refuse to stop his horse. He could and should have stopped then and there; if he had stopped he would not have been in apparent danger, whether he had remained in his wagon or had jumped from it and taken his horse by the head. The highway and adjoining ground for twenty-five feet upon each side of him was nearly level. He was not confused by other tracks, trains or engines. His horse was not restive. If he was absorbed in his own thoughts so as to be less than reasonably alert to the danger of the situation; if he underestimated the speed of the train, or overestimated the speed of his horse — or, all combined — it was his misfortune, not the fault of the defendant. The situation does not support the inference that it must have appeared to him that it was dangerous for him to stop where he was, but rather that he supposed that he could safely pass the crossing; thus he voluntarily — not under the coercion of other apparent danger, for which the defendant was in fault — took the risk. He could have made no serious comparison between the danger to be apprehended from the fright of his horse and from collision with the train.

The burden was upon the plaintiffs to show that their intestate acted with reasonable care under the circumstances. The charge of the trial court permitted such finding, but the evidence did not. The charge was inapplicable, and the verdict without support in the evidence.

The judgment should be reversed and a new trial granted, costs to abide the event.

MARTIN, J. (dissenting). As this court can review questions of law only, I cannot concur in the prevailing opinion. The conclusion that the plaintiffs' intestate was guilty of contributory negligence, as a matter of law, is not sustained by the decisions of this court. The question of contributory negligence is generally a question of fact to be determined by a jury, and is not within the province of the court. It is only where it clearly appears from all the circumstances, or is proved by uncontroverted evidence, that the party injured has, by his own acts or neglect, contributed to the injury, that the court can determine that question. (*Lane v. Atlantic Works*, 111 Mass. 136; *Weber v. N. Y. C. & H. R. R. R. Co.*, 58 N. Y. 451; *Davis v. N. Y. C. & H. R. R. R. Co.*, 47 N. Y. 400; *Hackford v. N. Y. C. & H. R. R. R. Co.*, 53 N. Y. 654.) The instances in which such determinations have been sustained have been exceptional cases in which the court has adjudged that such negligence was conclusively established by evidence which left nothing, either of inference or of fact, in doubt or to be settled by a jury. (*Massoth v. D. & H. C. Co.*, 64 N. Y. 529; *Casey v. N. Y. C. & H. R. R. R. Co.*, 78 N. Y. 518; *Stackus v. N. Y. C. & H. R. R. R. Co.*, 79 N. Y. 464; *Shaw v. Jewett*, 86 N. Y. 616; *Cosgrove v. N. Y. C. & H. R. R. R. Co.*, 87 N. Y. 88; *Sherry v. N. Y. C. & H. R. R. R. Co.*, 104 N. Y. 652; *Greany v. Long Island R. R. Co.*, 101 N. Y. 419; *Palmer v. N. Y. C. & H. R. R. R. Co.*, 112 N. Y. 234; *Feeney v. Long Island R. R. Co.*, 116 N. Y. 375; *Swift v. S. I. R. T. R. R. Co.*, 123 N. Y. 645; *Oldenburg v. N. Y. C. & H. R. R. R. Co.*, 124 N. Y. 414; *Doyle v. P. & N. Y. C. & R. R. Co.*, 139 N. Y. 637; *Graham v. Manhattan Rwy. Co.*, 149 N. Y. 336.)

Where no presumption of law exists, the process of ascertaining one fact from the proof of another is within the exclusive province of a jury. It is not indispensable that the particular circumstances relied upon to prove a fact be con-

tradicted in order to make a disputed question of fact. If other circumstances appear in antagonism to the alleged fact, it is for the jury to determine whether the fact is proved. The jury is not only to pass upon the conflicting evidence, but when different inferences may be drawn from the evidence or the conduct of parties, they are to be drawn by the jury and not by the court. (*Justice v. Lang*, 52 N. Y. 323; *Hazman v. Hoboken L. & I. Co.*, 50 N. Y. 53; *Powell v. Powell*, 71 N. Y. 71; *Hart v. Hudson River Bridge Co.*, 80 N. Y. 622.) That different inferences might be drawn from the facts and circumstances of this case becomes quite apparent when we consider that the jury, the trial court, and all the judges who have passed upon the question save one have reached an opposite conclusion from that of the majority of this court.

That in this case the evidence was sufficient to justify the jury in finding the defendant negligent, is assumed in the prevailing opinion and cannot be denied. To reach the conclusion that the plaintiffs' intestate was guilty of contributory negligence, it is assumed that the proof was undisputed that the head of his horse was within six feet of the nearest rail when the decedent looked towards the coming train, and that looking past the projecting window at the station he could have seen it approaching at the distance of about two hundred feet. But from the evidence the jury was justified in finding that he did not see the train until his horse's head was within two feet of the nearest rail. If he could then have seen it a distance of two hundred feet, there would have been less than three seconds of time before it reached the crossing if running at fifty miles an hour, as the jury was warranted in finding. The proof also discloses that the intestate arose from his seat, seemed about to jump from his wagon, but instead changed his lines, whipped up his horse, and attempted to cross the track, when he was struck by the train and killed. From this proof this court infers that the intestate was not in imminent danger, that no alternatives were presented to him, and asserts that he could have stopped his

horse, and if he had he would not have been in danger whether he remained in the wagon or jumped to the ground. That the intestate, who must have known as much of his horse, its habits, safety and reliability as a stranger, would have attempted to cross the track, or jump from his wagon, if the horse had been safe to stand within two feet of the track facing a rapidly passing train, or could have been safely turned without coming in contact with it, is not to be conjectured or surmised under the circumstances disclosed in this case. I know of no authority which permits this court to draw those inferences from the proof, instead of relying upon the findings of the jury. The proof furnishes no incontrovertible inferences to that effect. The conclusion that the intestate was not in danger is based upon the theory that his horse was old and slow. That inference might perhaps have been drawn by the jury, but cannot, I think, be held as a matter of law. This horse, said to be old and slow, was standing two feet from the railroad track, upon which there was a train running fifty miles an hour. I cannot assent to the proposition that even such a horse could have been stopped and would have stood within that distance from the track, where the projecting car would have nearly, if not quite, reached him, and there would have been no apparent danger. The common experience of those familiar with horses, their use, their habits and their dispositions is that it is precisely that kind of a horse which, when frightened, becomes utterly unmanageable and often serious if not fatal results follow. Hence, the danger of stopping may have been equally as great as the attempt to cross. To hold otherwise as a matter of law seems to me unjustifiable. Again, how this court is able to determine that the decedent could have made no serious comparison between the danger to be apprehended from the fright of his horse and from a collision with the train, I do not understand. That he did is obvious, as his first determination evidently was to jump from the wagon. This not only shows that more than one alternative was presented to his mind, but that he appreciated and was confused by the imminent peril of the situation.

If it be suggested that the decedent might have turned his horse and thus escape all danger, we find no basis for that conclusion as a matter of law. With a horse standing within two feet of the rails while a train was approaching which projected nearly that distance beyond them, without knowing the circle within which the wagon might be turned, it is quite difficult to say that the decedent might have turned his wagon without its coming in contact with the approaching train.

The jury was justified in finding that by its negligence the defendant lured the intestate into a place of imminent danger. Its train was running at fifty miles an hour, a speed at which it was never seen to pass that place before. It usually had a flagman at the crossing when it passed, but when the accident occurred no flagman was there. No whistle was sounded, no bell rung, and no notice whatever was given of its approach. As the intestate neared the crossing his view was so obstructed that he could not discover the on-coming train until he was in a place of great peril. His situation was one to excite fear and terror, and would naturally paralyze the mind and cloud the judgment of the most reckless or brave.

It is obvious that the decedent was placed in a situation where he was required to adopt one of at least three perilous alternatives: 1. To attempt to pass over the track before the train reached the crossing; 2. To stop at a place where the passing cars would have nearly, if not quite, come in contact with the head of his horse; or, 3. To attempt to turn around and thus try to avoid a collision. To be successful, any of these attempts must be performed in less than three seconds. That any of these alternatives would have prevented the accident cannot be held as a matter of law under the circumstances established. This court may conjecture or speculate in regard to what would have been the result if some other course had been pursued, but there is no such incontrovertible proof of the probable result of such a course as to present a question of law.

A person who, through the negligence of another finds himself in a position of danger, cannot be held guilty of contribu-

tory negligence because he does not act in the emergency in the best way to avoid the danger. That which may appear to be best to a court examining the matter afterwards at leisure, and upon a full knowledge of the facts anterior and subsequent, is not necessarily obvious, even to a prudent and skillful man upon sudden alarm. It would be absurd to hold that a person in imminent danger is negligent because he fails to take every precaution that a careful calculation would afterwards show he might have taken. The emergency in which the decedent was placed was one for which the defendant was responsible, and, hence, if the former did not exercise the presence of mind and judgment that an ordinarily prudent man would have exercised under ordinary circumstances, his acts cannot be held to constitute contributory negligence as a matter of law. (*Buel v. N. Y. C. R. R. Co.*, 31 N. Y. 314; *Filer v. N. Y. C. R. R. Co.*, 49 N. Y. 47; *Coulter v. A. M. U. E. Co.*, 56 N. Y. 585; *Lewis v. L. I. R. R. Co.*, 162 N. Y. 52.) This is the rule, even though it should transpire that no injury would have been sustained had the decedent adopted some other course. (*Twomley v. C. P., N. & E. R. R. R. Co.*, 69 N. Y. 158; *Bernhard v. R. & S. R. R. Co.*, 1 Abb. Ct. App. Dec. 131; *Reister v. Starin*, 73 N. Y. 601; *Wynn v. C. P., N. & E. R. R. R. Co.*, 133 N. Y. 575.)

That a person approaching a railroad crossing is not required as a matter of law to stop before attempting to cross, but that his omission to do so is a fact for the consideration of the jury, is well established by the decisions of this court. (*Davis v. N. Y. C. & H. R. R. R. Co.*, 47 N. Y. 400; *Dolan v. D. & H. C. Co.*, 71 N. Y. 285; *Kellogg v. N. Y. C. & H. R. R. R. Co.*, 79 N. Y. 72; *Stackus v. N. Y. C. & H. R. R. R. Co.*, 79 N. Y. 464, 467; *Judson v. Central Vermont R. R. Co.*, 158 N. Y. 597.)

It seems to me plain that under the authorities it is impossible to properly hold that the question of the decedent's contributory negligence was a question of law. The questions were, *first*, what was ordinary care under the circumstances established upon the trial: *second*, if the intestate was not

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placed in a position of imminent danger by the negligence of the defendant, did the conduct of the decedent come up to that standard; and, *third*, was he placed in a position of imminent peril? No standard has been fixed by law which is applicable to the facts and circumstances of this case by which these questions can be determined, and, therefore, they were for the jury and not for the court.

I think the judgment should be affirmed.

PARKER, Ch. J., O'BRIEN, BARTLETT and HAIGHT, JJ., concur with LANDON, J., for reversal; VANN, J., concurs with MARTIN, J., for affirmance.

Judgment reversed, etc.

In the Matter of the Judicial Settlement of the Accounts of
HARRIET RUTLEDGE, as Executrix of the Last Will and Testament of WALTER HEARD, Deceased.

HARRIET RUTLEDGE, Individually and as Executrix et al.,
Appellants; HELEN M. COLLIER, Contestant, Respondent.

EXECUTORS AND ADMINISTRATORS—POWER OF SURROGATE TO DENY COMMISSIONS. A surrogate may, in his discretion, upon the settlement of an executor's accounts, deny him the statutory commissions if he has been guilty of misconduct, as the language of section 2790 of the Code of Civil Procedure, providing that on the settlement of the account of an executor or administrator, the surrogate "must allow to him for his services" the commissions fixed by law, is not necessarily exclusive of all discretion in the surrogate, and its exercise should be left to him upon the facts.

Matter of Rutledge, 87 App. Div. 633, affirmed.

(Argued January 23, 1900; decided February 27, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, made February 3, 1899, affirming a decree of the Surrogate's Court of Ontario county settling the accounts of Harriet Rutledge, as executrix of the last will and testament of Walter Heard, deceased.

The nature of the proceeding and the facts, so far as material, are stated in the opinion.

Henry M. Field for Harriet Rutledge, individually and as executrix, appellant. The surrogate erred in refusing to credit executrix with her legal commissions, as fixed by section 2730 of the Code of Civil Procedure. (*Cook v. Lowry*, 95 N. Y. 103; Story's Eq. Juris. § 1272; *Roosevelt v. Raphet*, 6 Abb. [N. C.] 447.)

Frank Rice for Eliza C. Redhouse, executrix, and others, appellants.

John Gillette for Helen M. Collier, contestant, respondent.

GRAY, J. Upon the accounting of this executrix, objections were filed and a hearing had before the surrogate, who rendered his decision with findings of fact and conclusions of law; upon which a final decree, of the Surrogate's Court for the county of Ontario, was duly entered, which judicially stated and settled the account. Upon appeal, the decision was unanimously affirmed by the Appellate Division, in the fourth department, and appeals were taken by the executrix and by other parties interested in the estate, and in its distribution, to this court.

I think no error has been presented, which, in view of the unanimous affirmance of the decree of the Surrogate's Court, would warrant a reversal of the order and that it should be affirmed. The only question, demanding any consideration by this court, arises upon the exception of the executrix to the surrogate's conclusion that she was not entitled to commissions. There had been the finding of fact that she "did not give proper personal attention to the estate she had in charge, but delegated to her counsel duties which were imposed upon her as such executrix, knowing that he represented conflicting interests." The question is whether a surrogate has the power to withhold commissions upon the facts of the case; or whether he is without discretion in the matter and must, in all cases, allow commissions at the rate fixed by the statute.

It may be that this question is still open to us; but I do not think that it can be said that the question of the right to deny

commissions was not deliberately passed upon in *Stevens v. Melcher* (152 N. Y. 533). The point was distinctly made by counsel in that case that "the General Term erred in affirming the judgment of the Special Term and referee in refusing to allow commissions to Mrs. Stevens." Mrs. Stevens was the executrix, whose commissions were in question, and it was claimed, in answer to the appellants' point, that, under the facts found by the referee, his conclusion as matter of law that Mrs. Stevens was not entitled to commissions, necessarily, followed. The controversy with respect to commissions was discussed in the opinion; which, after referring to the facts which the referee had found relative to the manner in which Mrs. Stevens had discharged her duties as executrix, held that, upon the findings, the conclusion of the referee should be sustained.

In *Wheelwright v. Rhoades*, (28 Hun, 57), which related to the settlement of the accounts of executors, it was said by DAVIS, P. J., delivering the opinion of the General Term, in the first department, that "it is in the power of the surrogate or court to deny all commissions where there has been misconduct on the part of executors, resulting in losses to the estate greater than the lawful compensation. And executors may be personally charged with losses and injuries prejudicial to their trust, and denied commissions altogether, in the sound discretion of the court, in cases deserving great severity of censure."

In *Matter of Curtiss*, (9 App. Div. 285), the Appellate Division, in the second department, affirmed a decree of the surrogate upon his opinion. Surrogate SILKMAN, in that opinion, used this language: "Under the provisions of the code as they exist, there is no power to deny such commissions, except for misconduct on the part of the executor or trustee."

In *Matter of Estate of Harnett*, (15 N. Y. St. Rep. 725), Surrogate RANSOM held that the administratrix should be denied commissions; because she had been grossly delinquent in her administration of the estate.

It is sought to make a distinction between what a court of

equity may do and what the Surrogate's Court, being one of limited jurisdiction, may do with respect to executor's commissions. It is said that while a court of equity, with its general powers and jurisdiction, might withhold commissions, in its discretion; a Surrogate's Court, for the lack of those powers, is under the strict mandate of the statute. The provision of the statute, which is found in section 2730 of the Code, reads that, "On the settlement of the account of an executor or administrator, the surrogate must allow to him for his services," etc., and it is argued that in that language there is no room for the suggestion that anything is left to the discretion of the surrogate. I do not feel so confident, however, that the language requires of us that we read it with such strictness. Is there not an implication that services must have been rendered and, further, that the services must have been beneficial to the estate? If no services were rendered and the executor, or administrator, was delinquent in that respect; or if the services were such as were prejudicial to the just and lawful administration of the estate, then, were there such services rendered to the estate, for which the surrogate *must* allow commissions? I doubt it and I doubt if there be any good reason for our making the distinction which is contended for. I cannot think that, where the authority for commissions to an executor, or administrator, depends upon one statutory provision, they may be denied, if the accounting happens to be in a court of equity, and must, under all circumstances, be allowed, if the accounting happens to be in the Surrogate's Court.

I am of the opinion that the language of the statute is not necessarily exclusive of all discretion in the surrogate and that its exercise should be left to him upon the facts; in the review of which by the Appellate Division ample opportunity for correction is afforded. I do not know that there is any public policy involved in this matter and, yet, it seems to me that a better policy is subserved by making the allowance of commissions to executors and administrators to depend upon the faithful rendition of services by them and by giving such a

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construction to the section of the Code in question, as will vest some discretion in the surrogate upon the subject.

The order appealed from should be affirmed; with costs to all parties appearing in this court by counsel and filing briefs, payable out of the estate.

PARKER, Ch. J. (dissenting). I dissent from so much of the decision declared by the majority of my associates in this case as affirms the order of the surrogate refusing commissions to the executrix, Harriet Rutledge.

As to the other questions I agree that they are put beyond our reach by the unanimous decision of the Appellate Division, by which the findings of fact of the surrogate are made conclusive.

The executrix in this case is a woman without much business experience, and she suddenly found herself placed, by the will of her brother, in charge of an insolvent estate, the situation being complicated by the fact that the testator had received funds, as trustee, and had commingled these funds with his own in the matter of making investments. It was impossible in some instances to trace the trust fund into securities found in his possession, and to advise and aid her in the execution of the trust she employed an attorney, who seems to have made some serious mistakes — mistakes for which the surrogate has held the executrix responsible. Not content with that, he concluded further to punish her for having reposed too much confidence in her attorney by imposing upon her a fine in the amount of her commissions. This he had no power to do.

The statute fixes the compensation to be allowed by the surrogate to executors and administrators absolutely. It confers no discretion whatever upon that officer, who can neither add to nor take from the amount fixed by the statute. Whether the services performed be little or much matters not, for the statute declares the basis upon which such amount shall be computed. If the legislature had intended that the surrogates of the state should be vested with the authority to

grant or withhold commissions in their discretion it would have said so, but it did not vest surrogates with any discretion whatever in that direction, and that its action was wise experience teaches and this case illustrates. But whether it was wise or otherwise is of no consequence, for the power was vested in the legislature alone to determine whether commissions should be allowed, and upon what basis, and having allowed commissions in this class of cases its action is conclusive upon the surrogates of this state.

Our attention has been called to some authorities which, it is suggested, show that this court has held that a surrogate can withhold commissions from an executor or administrator as a punishment for negligent conduct. Those authorities hold no such thing, as I shall point out later ; but if they did, it would be the duty of this court to disregard them, for it is the statute, not the decisions, which constitutes the law of this state upon that subject.

Turning to the provisions of the statute, which may now be found in section 2730 of the Code, we read: " On the settlement of the account of an executor or administrator, *the surrogate must allow* to him for his services, and if there be more than one, apportion among them according to the services rendered by them respectively, over and above his or their expenses. For receiving and paying out all sums of money not exceeding one thousand dollars, at the rate of five per centum. For receiving and paying out any additional sums not amounting to more than ten thousand dollars, at the rate of two and one-half per centum. For all sums above eleven thousand dollars at the rate of one per centum. * * * " There is no room for the suggestion that in the language quoted above there is anything left to the discretion of the surrogate. He is commanded to allow the commissions. If the executor squanders any part of the estate, the surrogate must charge him with the diminution ; if he loses a part of it through negligence, the surrogate must charge him with the loss ; if he commingles the funds with his own, the surrogate may charge him with interest computed with annual rests, so that

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the estate may be fully protected ; but the surrogate cannot do more. He cannot impose fines and penalties because, in his judgment, the conduct of an executor or administrator merits it. The legislature took away from him all opportunity for doing so by its command that he "must" allow commissions at a fixed rate.

Now it is true that there have been a few instances where, in defiance of the statute, commissions to which an executor or administrator were entitled have been disallowed by surrogates who doubtless thought they had the power so to do.

But whatever may have been decided in Surrogate's Court there are no decisions in this court holding that a surrogate possesses the power to withhold the commissions of an executor or administrator, either because he thinks the services were not worth the amount fixed by the statute or because the executor was advised wrongly by his attorney.

My attention has been called to several cases in this court in which the question of commissions of trustees has received consideration, namely, *Cook v. Lowry* (95 N. Y. 103); *Laytin v. Davidson* (Ib. 263); *Matter of Petition of Allen* (96 N. Y. 327), and *Stevens v. Melcher* (152 N. Y. 551). Every one of those cases presented the question whether commissions should be allowed to trustees and in each of them the original decree was not by a surrogate, but by the Supreme Court on its equity side. In *Laytin's* case appellant's counsel contended that the statute did authorize the fixing of the rate of compensation of testamentary trustees, and it was said in the opinion that the executors had had a final accounting and been discharged as such and that the fund had been exclusively a trust fund under the will, and it was held that the court had jurisdiction to award commissions to testamentary trustees, thus concurring in an opinion on that subject to be found in *Matter of Roosevelt* (5 Redfield, 601). *Cook v. Lowry* was an action for the construction of a will and for an accounting of the trustee appointed after the discharge of the executors, and as he had put the *cestui que trust* to great trouble in determining his rights, the trial court held that the

trustee's commissions could be withheld and that decision was affirmed in this court. The *Matter of Allen* did not involve that question at all; there the testamentary trustee applied to the Supreme Court to be released from the trust and the court concluded not to award him compensation as if he had performed the trust to the end, but instead ordered fixed a sum of money which it determined to be reasonable in view of the labor performed and that order was affirmed in this court, it being held that compensation could not be claimed as of course because that rule applies only where the trust created has been fully executed, that the petitioner applied for his discharge and it being tendered him if he saw fit to accept it he had to do so upon the terms and conditions imposed by the court, one of which was that he should accept a certain sum of money in lieu of fees. *Stevens v. Melcher* was an action for an accounting and presented many questions, one of which was whether the trustee, against whom findings of serious misconduct had been made on the trial, might be disallowed commissions in accordance with the conclusion of the trial court based upon such findings, and it was decided that they might be withheld.

As I have already said, in not one of these cases was the statute to which I have referred considered. That statute refers to the commissions of *executors and administrators only* and governs this case, while in the cases considered (*supra*) the question related to the compensation of testamentary trustees, for which section 2730 of the Code does not provide. By chapter 115 of the Laws of 1866, trustees were authorized to have their accounts as such trustees finally settled before the surrogate, the act providing a practice the same as where an account is rendered by an executor or administrator, including an appeal from the decree of a surrogate, and it also provides that the surrogate shall allow to the trustee or trustees the same compensation for his or their services by the way of commissions as is allowed by law to executors and administrators. Prior to that time testamentary trustees were liable to account to a court of equity in the

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case of a trust expressly created by any last will or testament. (2 R. S. 94, section 66.) It was this section that was amended by chapter 115, Laws of 1866 (*supra*). As there was no statute commanding courts of equity to allow any compensation whatever to testamentary trustees that court was not accustomed to allow any compensation down to the enactment of the act of April, 1817, declaring it to be lawful for the Court of Chancery to make a reasonable allowance to executors, administrators and guardians. Prior to that time executors and administrators, like other trustees, were not allowed anything for their services. The first case after the passage of the act of 1817 was *Matter of Roberts, a Lunatic* (3 Johns. Ch. 43), in which Chancellor KENT considered the case of a committee of a lunatic as coming within the equity of the statute of 1817, and fixed his compensation. Later, in *Meacham v. Sternes* (9 Paige's Ch. 398), which was a case in which the court was asked to fix the compensation for trustees where the deed creating the trust contained no provision as to their compensation, the chancellor said: "The question, therefore, appears to be presented for the decision of the court, whether such a trustee is entitled to compensation for his services, within the equity of the act of April, 1817, and of the provisions of the Revised Statutes as to the allowances to be made to executors, etc. * * * It may, therefore, be considered the settled rule, so far as the decision of this court can settle it, that in all cases of trusts of this description, and all other express trusts of a similar nature, where nothing is said in the deed or instrument creating the trust on the subject of compensation to the trustee, for his personal services in the execution of the trust, and where there is no agreement on the subject for a different allowance, that the trustee, upon the settlement of his accounts, will be allowed the same fixed compensation for his services, by way of commissions, as are allowed by law to executors and guardians; and to be computed in the same manner. In other words, the court will consider the statutory allowance to executors, administrators and guardians, as the compensation tacitly understood and agreed on by the parties

to all trusts, of a similar nature, where nothing appears to show a different agreement or understanding on the subject of compensation." As the court was not hampered by statute in that regard, it allowed compensation as a matter of justice, but when it came to a case where the trustee had neglected to perform his duty, it withheld compensation. When the legislature came to enact chapter 115 of the Laws of 1866, it recognized this jurisdiction of equity, and did not interfere with the rate of compensation to be allowed by that court in cases where accountings of trustees should be had before it, but simply authorized trustees to account before the surrogate, and commanded the surrogate to allow the same rate of compensation as by statute was allowed to executors and administrators. As originally enacted, the Revised Statutes of 1828 provided that on the settlement of executors or administrators "the surrogate *shall* allow to them for their services," &c., (2 R. S. 93, section 58) (since that time for "shall" has been substituted "must," a word which, to say the least, does not tend to detract from the forcefulness of the command of the statute), and shortly thereafter, in the year 1836, a decree of the surrogate of the county of New York came up for review before the chancellor. One of the questions presented was whether the surrogate had the right to withhold the commissions of an administrator because of his gross misconduct of the administration of the intestate's estate. The chancellor said: "The surrogate takes no power by implication; and the direction of the statute is positive that upon the settlement of the account of executors and administrators in a proceeding before him, the surrogate shall allow them certain specified commissions, for their services, over and above their expenses; except in those cases where a specific compensation for such services is allowed by the will of the decedent. (2 R. S. 93.) The appellant, therefore, had the same right to be credited his legal commissions for receiving and paying out the moneys of the estate, as he had to be credited for moneys paid by him for debts and funeral expenses." (*Halsey v. Van Amringe*, 6 Paige's Ch. 16.) In *Dakin v. Demming* (Id. 95) the chancellor

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had before him the same question on an appeal from the decree of the surrogate of the county of Oneida, and he said : "Indeed the statute under which the surrogate supposed he was proceeding to take this account, is imperative that he shall allow the personal representatives such commissions ; and this court has recently decided that the surrogate has no discretion on the subject." (Citing *Halsey v. Van Amringe, supra.*)

The statutes and cases cited, together disclose that, prior to 1817, executors, administrators and trustees were not compensated for their services. The act of April 15, 1817, did not fix the rate nor direct the allowance of compensation. Instead, it declared that it should be lawful for the Court of Chancery, in the settlement of the accounts of guardians, executors or administrators, to make a reasonable allowance to them for their services. The chancellor settled the rate of allowance in *Matter of Roberts (supra)*, and in the same month a general rule, adopting the basis of the *Roberts* case for allowances, was passed for all cases. From that date to this, the legislature has not attempted to interfere with the practice of courts of equity in such cases, and we need not go far afield to find the reason for it. But as we are considering the effect of a statute, we pass that by and note that upon the enactment of the Revised Statutes in 1828, the legislature commanded the surrogates to allow a certain rate of compensation to executors and administrators. It did not provide for the compensation of executors and administrators generally, which would have included accountings in a Court of Chancery as well as before the surrogate, but the direction was to the surrogate, thus again manifesting the legislative policy to be one of non-interference with the jurisdiction of chancery under that head. The Court of Chancery continued to exercise exclusive jurisdiction as to the accounts of trustees of express trusts until 1866, during all of which time it was accustomed to compensate trustees on the same basis as executors and administrators, although it occasionally withheld compensation for misconduct. It is noticeable that the act of 1866 (Chap. 115), following consistently all previous legisla-

tion upon the subject, did not attempt to provide a rate of compensation to testamentary trustees generally, which would have included such accountings in a court of equity, but it commanded the surrogate that in accountings of testamentary trustees before him he should allow to them compensation the same as allowed to executors and administrators.

Enough has already been said to make it clear that the persistent insistence that the decisions to which I have referred require this court now to hold that the statute directing surrogates to allow commissions is to be followed or not in the discretion of the surrogate, is wholly without foundation, and, therefore, those decisions do not embarrass this court in giving to the statute that construction which was given to it almost immediately upon its enactment, a construction required by every rule of statutory construction applicable, and one which does not permit the Surrogate's Court to set at naught the command of its creator, the legislature, that it "must allow" to an executor or administrator the compensation provided in section 2730.

BARTLETT, VANN and CULLEN, JJ., concur with GRAY, J., for affirmance: MARTIN and WERNER, JJ., concur with PARKER, Ch. J.

Order affirmed.

ALBERT L. PURDY, Respondent, v. ERIE RAILROAD COMPANY, Appellant.

1. MILEAGE BOOK ACT — CONSTITUTIONAL AS TO SUBSEQUENT CORPORATIONS. The Mileage Book Act (L. 1895, ch. 1027), although declared by the Supreme Court of the United States unconstitutional as to railroad corporations theretofore incorporated, is constitutional as to a railroad corporation thereafter incorporated in the state of New York, and whose franchises and property rights, so far as the record shows, have accrued subsequent to the enactment of the statute.

2. BURDENS NOT INCREASED BY L. 1896, CH. 835. The amendment to said Mileage Book Act of 1895 (L. 1896, ch. 835) did not increase the burdens of railroad corporations, and hence the amendment is constitutional in all cases where the original act would be upheld.

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D22 SC 605

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3. MILEAGE BOOK ACTS—NOT REGULATIONS OF INTERSTATE COMMERCE. Statutes, relative to mileage books, when limited to railroad transportation wholly within the state, are a valid exercise of the power of the state and are not regulations of interstate commerce.

4. APPEAL. The objection, that statutes invade the property rights of a corporation in violation of the State or Federal Constitutions, is not available in the Court of Appeals unless it has been taken below.

Purdy v. Erie R. R. Co., 33 App. Div. 643, affirmed.

(Argued January 29, 1900; decided February 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 17, 1898, overruling defendant's exceptions ordered to be heard in the first instance by the Appellate Division, denying a motion for a new trial, and directing the entry of a judgment in favor of plaintiff upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

Adelbert Moot and *George F. Brownell* for appellant. As the statute in question violates the Constitution of the state of New York, which provides: No person shall be deprived of life, liberty or property without due process of law; also the Constitution of the United States, which provides: No state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, it follows that said statute is void, and the judgment herein has no foundation on which to rest. (N. Y. Const. art. 1, § 6; U. S. Const. art. 14, § 1; *Taylor v. Porter*, 4 Hill, 140; *Matter of Jacobs*, 98 N. Y. 98; *People v. Marx*, 99 N. Y. 377; *Wynehamer v. People*, 13 N. Y. 378; *People v. Budd*, 117 N. Y. 1; *Gilman v. Tucker*, 128 N. Y. 190; *People ex rel. v. Albertson*, 55 N. Y. 50; *People ex rel. v. Otis*, 90 N. Y. 48; *People v. Gillson*, 109 N. Y. 389.) The legislation in question does not apply to this defendant, because of the statute incorpo-

rating it and subsequent statutes, and, therefore, judgment should have been rendered against plaintiff, not defendant. (*C., etc., B. Co. v. Kentucky*, 154 U. S. 204; *Reagan v. F. L. & T. Co.*, 154 U. S. 362; *Smyth v. Ames*, 169 U. S. 466; L. 1890, ch. 565, §§ 181-183.) The legislation in question amounts to a regulation of interstate commerce, and is, therefore, void within the decisions of the United States Supreme Court. (*W., etc., Ry. Co. v. Illinois*, 118 U. S. 557.) If the legislation in question can be construed to apply only to the 'line or lines in New York state, then the plaintiff should have demanded a mileage book upon the line or lines in New York state alone, and as he never demanded such a mileage book, the defendant did not subject itself to a penalty by neglecting or refusing to deliver a different mileage book to the plaintiff when the mileage book demanded by the plaintiff was one that would have been good upon any of the lines of the defendant. (*Porter v. D. B. Co.*, 157 Penn. St. 367.) The legislation in question contemplates an actual passenger in good faith purchasing and holding a mileage book with intent to use it, and, therefore, a party can only maintain an action for a penalty under that legislation, provided he was an actual passenger, in good faith, applying for such a mileage book with intent to use it, under the statute. (*Myers v. B. H. R. R. Co.*, 10 App. Div. 335.)

Clarence A. Farnum for respondent. The Mileage Book Act is not invalid as being in violation of article 14 of section 1 of the United States Constitution, or article 1, section 6, of the New York State Constitution, in this, that the defendant is deprived of its property without due process of law. (*Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517; *G. R. R. & B. Co. v. Smith*, 128 U. S. 174; *Stone v. F. L. & T. Co.*, 116 U. S. 307; Cooley's Const. Lim. [6th ed.] 734-738; *Dow v. Biedelman*, 125 U. S. 680; *W. & L. T. Co. v. Croxton*, 23 L. R. A. 177; *C. & G. T. Ry. Co. v.*

Wellman, 143 U. S. 339; *Ryan v. L. & N. Terminal Co.*, 45 L. R. A. 303; *Brass v. North Dakota*, 153 U. S. 391; *L. & N. R. Co. v. Kentucky*, 161 U. S. 677.) This act does not attempt to regulate commerce between the states, and does not purport to nor could it act outside of the state of New York. (*C. & G. T. Ry. Co. v. Wellman*, 143 U. S. 339; *H. B. Co. v. Kentucky*, 166 U. S. 150; *N. Y., L. E. & W. R. R. Co. v. Penn.*, 158 U. S. 431; *Hopkins v. U. S.*, 171 U. S. 578; *Thomas v. Gay*, 169 U. S. 264.) The Mileage Book Acts do not deny to the defendant the equal protection of the laws. (*Haynes v. Missouri*, 120 U. S. 71; *Maryland v. Broadbelt*, 45 L. R. A. 433.) The defendant cannot urge any constitutional question in this court other than the one that the Mileage Book Act is in violation of the United States Constitution in its attempt to regulate commerce among the states. (Baylies' N. T. & App. 275; Code Civ. Pro. § 190; *Vose v. Cockcroft*, 44 N. Y. 415; *Delaney v. Brett*, 51 N. Y. 78; *Pierce v. S. Ry. Co.*, 171 U. S. 641; *City of Buffalo v. N. Y., L. E. & W. R. R. Co.*, 152 N. Y. 276; *H. P. Co. v. S. I. Co.*, 157 N. Y. 437, 441; *Murdock v. Mayor, etc.*, 87 U. S. 590; *Wilson v. McNamee*, 102 U. S. 572; *Matter of Houdayer*, 150 N. Y. 37; Cooley's Const. Lim. [6th ed.] 19.) The Mileage Book Act being in force at the time the defendant was incorporated, it does not lie within the power of the company to allege its invalidity. (*Town of Pierrepont v. Loveless*, 72 N. Y. 216; *Plumb v. Christie*, 103 Ga. 686; *People v. R. & S. R. R. Co.*, 15 Wend. 113; *Reid v. Town of Eatonton*, 80 Ga. 755; Cooley's Const. Lim. [6th ed.] 479; *People ex rel. v. Barnard*, 110 N. Y. 548; *Mayor v. B. & S. A. R. R. Co.*, 17 Hun, 242; *Ashley v. Ryan*, 153 U. S. 436; *Railroad Co. v. Gibbs*, 24 S. C. 60; *L. & N. R. Co. v. Kentucky*, 161 U. S. 677; *Bushwick v. Ebbets*, 3 Edw. Ch. 353.) The plaintiff was entitled to recover a penalty of fifty dollars each time he was refused a mileage book, for which an action was brought,

and he was not limited to a single recovery. (*Fisher v. N. Y. C. & H. R. R. Co.*, 46 N. Y. 644; *Casey v. N. Y. C. & H. R. R. Co.*, 49 N. Y. 675.) The motive of the plaintiff in demanding such ticket cannot relieve the defendant from performing the statutory duty imposed upon it. The penalty is imposed upon the corporation for its failure to comply with the mandate of the legislature. (*Fisher v. N. Y. C. & H. R. R. Co.*, 46 N. Y. 644; *Clinton v. Myers*, 46 N. Y. 511; *Phelps v. Nowlen*, 72 N. Y. 39; *Morris v. Tutthill*, 72 N. Y. 575; *Cotheal v. Browner*, 5 N. Y. 562; *Myers v. B. H. R. R. Co.*, 10 App. Div. 335.)

CULLEN, J. This action, similar in character to that of *Beardsley v. N. Y., L. E. & W. R. R. Co.*, is brought to recover penalties for the refusal of the defendant to issue mileage books, as prescribed by chapter 1027 of the Laws of 1895, as amended by chapter 835 of the Laws of 1896. The record in this case, however, differs materially from that in the *Beardsley* case, both in its facts and in the objections taken by the counsel to the right of the plaintiff to recover. The complaints (there were originally several actions which were subsequently consolidated into one) allege that the defendant is a railroad corporation organized under the laws of this state, and then set forth the various matters necessary to bring the defendant within the terms of the statute, and the details of the plaintiff's applications for mileage books and the defendant's refusal to issue them. They do not state when the defendant was incorporated. The answers to the several causes of action admitted the incorporation of the defendant and certain other allegations of the plaintiff in reference to the mileage of road operated by the defendant and its rates of fare, and put in issue the other averments of the complaint. They further set up that the defendant owned and operated a railroad extending through several states, and charge that the statute of 1896 "is unconstitutional and void, because it is in

violation of the provision of the Constitution of the United States, which commits to Congress the sole power to regulate commerce between the several states, and that it is unconstitutional and void because it is in violation of various other provisions of the Constitution of the United States, and of the Constitution of the state of New York." On the trial of the action the plaintiff put in evidence the certificate of the defendant's incorporation, of which the record contains only the following: "Certificate referred to shows that the Erie Railroad corporation, defendant, was duly organized and incorporated November 14, 1895, under the general laws of the state of New York for the incorporation of railroads." The earliest refusal to issue a mileage book, for which it is sought to recover the penalty, occurred on June 26, 1896. The defendant put in evidence a map showing the various lines of the Erie railroad, extending through this state and others, and "to make the description of the lines of the defendant more certain," as was stated by the counsel in offering them, two deeds, one from Arthur H. Masten, special master, to Charles Caster and others, and the other from Caster and others to the defendant. All the record states of these deeds is that they were "of the New York, Lake Erie & Western lines," and that they were delivered and recorded in November, 1895. This is all that appears concerning the original title to defendant's road. There is nothing to show the defendant has succeeded to the rights or franchises of any company antedating the enactment of the statute of 1895. While our personal knowledge may inform us of the history of the railroad lines operated by the defendant, to that we cannot appeal, and we can indulge in no presumption as to the existence of facts not appearing in the record. As the case stands before us we have a railroad company created after the statute of 1895, and whose franchise and property rights must be assumed to have accrued subsequently to that time. The question, therefore, is whether the statute of 1895, though

void as to existing railroad companies, is not constitutional and valid as to companies organized and acquiring property and franchises in the future.

That a statute, which is unconstitutional so far as it purports to operate retrospectively, may be upheld as to future cases, is settled by authority. (*People v. O'Neil*, 109 N. Y. 251; *Cooley Const. Lim.* 180.) We do not assent, however, to the broad claim of the learned counsel for the respondent that a corporation cannot object to the constitutionality of any statute enacted by the state prior to the time of its organization. Whether the proposition contended for is true or false depends on the ground on which the validity of the statute is assailed or its invalidity declared. If the state should require, or enact, that railroad companies thereafter organized must subject the management and conduct of any interstate transportation and business they may carry on, to state control, such a statute would be void as in contravention of the Constitution of the United States, which commits to Congress the regulation of interstate commerce. It is probable that there are provisions of the State Constitution, such as those regulating the administration of justice and ordained for the security of persons and property, which the legislature could not require even future corporations to waive as a condition of their charters. But the ground on which the Supreme Court of the United States in the case of *Lake Shore & M. S. Ry. Co. v. Smith* (173 U. S. 684) held the Mileage Book Act unconstitutional, was that it was an invasion of the property rights of the railroad company, in that it required the company to transport persons willing and able to purchase thousand-mile books at a less sum than the general or maximum rate allowed by law; in other words, that it compelled the company to surrender, as to such persons, the difference between the special rate of fare and the regular rate. This exaction was illegal, because it was without due process of law. We know of no reason, however, why a railroad company may not agree, upon sufficient con-

sideration, to surrender or transfer any specific pecuniary right. The right to contract as to property is one of the inherent rights of a citizen, of which he cannot be deprived, except as to that class of contracts which are condemned in the exercise of the police power, such as usury and the like. (*People v. Gillson*, 109 N. Y. 389.) The same liberty of contract exists in the grant of charters by the legislature. Therefore, a regulation as to the price of transportation, which would be an illegal exaction when sought to be imposed on existing corporations solely by legislative fiat, may, in the case of future corporations, be the mere performance of the obligation of a contract. The authority to construct and operate a railroad is not the natural right of a citizen, but a franchise proceeding from the favor or grant of the state. As a condition of such grant, the legislature might require the company to transport passengers at any prescribed rate of fare; equally, it may require that certain classes of passengers be transported at a particular rate of fare, or that any passenger, under certain circumstances and on compliance with certain requirements, be transported at such rate. In *Railroad Co. v. Maryland*, (21 Wall. 456) the Supreme Court of the United States said: "This unlimited right of the state to charge, or to authorize others to charge, toll, freight, or fare for transportation on its roads, canals, and railroads, arises from the simple fact that they are its own works, or constructed under its authority. It gives them being. It has a right to exact compensation for their use." So it was held that a reservation by the state to itself of one-fifth of the receipts for transportation of passengers was valid, and it was said that the state might have exacted the whole receipts. (See, also, *Ashley v. Ryan*, 153 U. S. 436, and *L. & N. Ry. Co. v. Kentucky*, 161 U. S. 677.)

The statute of 1896 was passed subsequently to the incorporation of the defendant, and if the statute increased the burden imposed on the defendant by the act of 1895, as to such additional burden it would be invalid. But a comparison

of the two acts shows that all the modifications of the statute of 1895 effected by the statute of 1896 are favorable to the railroad company. By the first act the mileage books entitled the holder, *i. e.*, the bearer or assignee, to transportation; by the second, the use of the book is limited to the purchaser and to certain members of his family and employees. By the act of 1895 there was imposed on the company the general duty to issue mileage books; by that of 1896 the company is required to keep such books for sale only at stations in incorporated villages and cities. By the earlier statute the company was practically required to accept the mileage books from passengers on the train in lieu of tickets; by the latter act, the mileage book can be used only in the purchase at the ticket office of a ticket for the proposed journey. We are of opinion, therefore, that the enactment of 1896 is constitutional and valid in the same cases where the statute of 1895 would be upheld.

While we have discussed, at some length, the constitutionality of the statutes of 1895 and 1896 as applied to future corporations, we doubt very much whether the defendant's objections and exceptions are sufficient to raise the question. So far as the pleadings are concerned the only attack on the validity of the statutes is that already quoted from the defendant's answer. At the opening of the trial the defendant moved to dismiss the complaint because it failed to state facts sufficient to constitute a cause of action for a penalty. No particular ground for the attack on the complaint is stated. At the close of the evidence, the defendant renewed its motion to dismiss the complaint, but the sole ground on which it assailed the validity of the statute itself was that it constituted an interference with the regulation of interstate commerce, and, hence, was in violation of the Constitution of the United States. The objection that the statute was an invasion of the defendant's property rights and contravened, for that reason, either the Constitution of the United States or the Constitution of this state, does not anywhere appear in the record, and the rule seems settled that such an objection,

to be available here, must have been raised in the courts below. (*Vose v. Cockcroft*, 44 N. Y. 415; *Delaney v. Brett*, 51 N. Y. 78.)

The objection that the statutes of 1895 and 1896 are regulations of interstate commerce, and, hence, in conflict with the Federal Constitution, is satisfactorily dealt with in the very clear opinion of Mr. Justice MERWIN of the Appellate Division, delivered in the *Beardsley Case* (15 App. Div. 251). That such a statute, if limited in its scope to transportation wholly within the limits of the state, is a valid exercise of state authority, is settled by the decision of the Supreme Court of the United States in *Stone v. Farmers' Loan & Trust Co.* (116 U. S. 307) where it was said: "It (the state) may, beyond all question, by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the state." This doctrine has never been overruled or limited; on the contrary, it is fully recognized in the later cases. (*Hennington v. Georgia*, 163 U. S. 299; *W. U. Tel. Co. v. James*, 162 U. S. 650; *L. S. & M. S. R. Co. v. Ohio*, 173 U. S. 285.) In *Wabash, S. L. & P. Ry. Co. v. Illinois* (118 U. S. 557) a statute of Illinois regulating fares was held void solely on the ground that the act, as interpreted by the Supreme Court of the state, included cases of transportation partly within and partly without the state. It was there stated: "If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the state, disconnected from a continuous transportation through or into other states, there does not seem to be any difficulty in holding it to be valid." There is nothing in the language of the statutes now before us that shows they were intended to affect any but intra-state transportation; but if their interpretation be doubtful "the courts must so construe a statute as to bring it within the constitutional limits, if it is susceptible of such construction." (*Sage v. City of Brooklyn*, 89 N. Y. 189; *People ex rel. Sinkler v. Terry*, 108 N. Y. 1.) Within this principle these statutes must be construed as applying to transportation wholly within the

state, and so construed they do not infringe upon the Constitution of the United States.

The judgment appealed from should be affirmed, with costs.

PARKER, Ch. J., GRAY, BARTLETT, VANN and WERNER, JJ., concur; MARTIN, J., concurs in result.

Judgment affirmed.

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JOHN J. LEWIS, an Infant, by JENNETTE L. LEWIS, his Guardian ad Litem, Respondent, v. THE LONG ISLAND RAILROAD COMPANY, Appellant.

1. APPEAL — COURT OF APPEALS PROHIBITED FROM REVIEWING SUFFICIENCY OF EVIDENCE. Where the Appellate Division has unanimously affirmed a judgment below, and subsequently allows an appeal therefrom upon a question of law, the Court of Appeals has no power to examine or determine whether there is any or sufficient evidence to sustain the verdict.

2. NEGLIGENCE — ACTION BY ENGINEER OF RAILROAD TRAIN IN AN EMERGENCY. Where an excursion coach, moving at the rate of five to seven miles an hour, suddenly presents itself, at a railroad crossing, to the view of the engineer of a train four hundred feet from the crossing, and which is approaching at the rate of thirty-five miles an hour, and he has only about eight seconds to determine what he will do in the matter, it is erroneous for the trial court to charge, in an action brought by a person who was on the coach and was injured by the resulting collision, that if the engineer, after seeing the horses of the coach, omitted to do "any act" which might have prevented the collision or lessened the danger, the railroad corporation was guilty of negligence, as such instruction ignores the situation at the time of the accident, and permits the jury to find negligence without regard to the facts and circumstances, such as the short period of time in which he was obliged to act, the impending danger and consequent excitement, the various acts required to stop or lessen speed and all the other circumstances surrounding him.

3. DRIVING ON STEAM RAILROAD TRACK WITHOUT STOPPING. It is proper for the trial court to refuse to charge, in such an action, that it is negligence as a matter of law to drive on a steam railroad track, at a point where the view is obstructed, without stopping, as the rule is that, while the traveler must listen and look, he is not required also to stop, and his omission to do so is a fact for the consideration of the jury.

4. OMISSION TO COMPLY WITH STATUTE RELATING TO SIGNBOARDS. A railroad corporation is not entitled to a charge, in an action brought by one who was injured at a railroad crossing which he had

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Statement of case.

never seen before, that no negligence can be imputed to the corporation by reason of the size or shape of the danger signal at the crossing, or the language of the warning to the public, or the length of its letters — these failing to comply with the Railroad Law (L. 1890, ch. 565, § 83) — as, in the case of one who is a stranger to the crossing, a failure in such respects might constitute actionable negligence, and justify a recovery when the injury was caused by a disregard of the statute.

5. DEGREE OF CARE REQUIRED AT A RAILROAD CROSSING. A traveler, approaching a railroad crossing, is bound to exercise ordinary, but is not bound to exercise extraordinary, care to detect an approaching train.

6. RELATION OF MASTER AND SERVANT. The relation of master and servant, and the consequent responsibility of the former for the acts of the latter, does not exist between associates who have hired a coach and its driver, it appearing that they neither selected nor paid him, and, at most, had only a right to order him to go forward or stop.

Lewis v. Long Island R. R. Co., 30 App. Div. 410, reversed.

(Argued January 10, 1900; decided February 27, 1900.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 13, 1898, upon an order unanimously affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

The appeal was allowed by the Appellate Division upon the ground that a question of law had arisen in this case which in its opinion ought to be reviewed by the Court of Appeals.

The nature of the action and the facts, so far as material, are stated in the opinion.

Benjamin F. Tracy and *William J. Kelly* for appellant. The trial judge erred in charging as requested by plaintiff's counsel. "If you find that the engineer of the defendant's train, after seeing the horses attached to the tally-ho in which plaintiff was seated, omitted to do any act which might have prevented the collision, or might have lessened the danger to plaintiff, defendant was guilty of negligence." (*Warner v. N. Y. C. R. R. Co.*, 44 N. Y. 465; *Chrystal v. T. & B. R. Co.*, 105 N. Y. 164; *Bittner v. C. S. Ry. Co.*, 12 Misc. Rep. 517; *Twomley v. C. P., N. & E. R. R. Co.*, 69 N. Y. 158; *Schneider v. S. A. R. R. Co.*, 133 N. Y. 586; *Stabe-*

nau v. A. A. R. R. Co., 155 N. Y. 511; *Wynn v. C. P., N. & E. R. R. Co.*, 133 N. Y. 575; *Baker v. E. A. R. R. Co.*, 62 Hun, 39; *Voak v. N. C. Ry. Co.*, 75 N. Y. 320; *Cuyler v. Decker*, 20 Hun, 173.) The court erred in refusing to charge the defendant's request, that "the plaintiff, uniting with others of the society in hiring so unusual and extraordinary a turnout for a day's outing in the country as a tally-ho coach, having a brake and drawn by six horses and carrying twenty-one people, so identified himself with the coach and driver that the negligence of the driver will be imputed to the plaintiff, and if such negligence contributed to produce the collision between the engine and the coach the plaintiff cannot recover." (*Allyn v. B. & A. R. R. Co.*, 105 Mass. 77; *McLaughlin v. Pryor*, 4 M. & G. 48; *Rourke v. W. M. C. Co.*, L. R. [2 C. P. Div.] 205; *Brown v. N. Y. C. R. R. Co.*, 31 Barb. 385; 32 N. Y. 597; *Titus v. Town of New Scotland*, 90 Hun, 468; *Smith v. N. Y. C. & H. R. R. Co.*, 38 Hun, 33.) The court erred in refusing to charge the defendant's request, "that the plaintiff, uniting with others of the society, in hiring so unusual and extraordinary a turnout for a day's outing in the country as a tally-ho coach, having a brake and drawn by six horses, and carrying twenty-one people, made himself responsible for the competency of the driver and of the helper; and if the incompetency of the driver, or of the helper, contributed to produce the collision between the engine and the coach, the plaintiff cannot recover." (*Robinson v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 11; *Dwyer v. E. Ry. Co.*, 71 N. Y. 228.) Plaintiff and his associates were so identified in a common enterprise that the negligence of his associates contributing to this accident should be attributed to the plaintiff and prevent his recovery. (*Donnelly v. B. C. R. R. Co.*, 109 N. Y. 16; *Beck v. E. R. F. Co.*, 6 Robt. 82; *Kessler v. B. H. R. R. Co.*, 3 App. Div. 426.) The exception to the refusal to charge that "it was negligence, as matter of law, to drive on a steam railroad track with the view obstructed at a jog trot, or at such a rate of speed that the horses could not be stopped or turned before going over the tracks," is well taken.

(*Salter v. U. & B. R. R. Co.*, 75 N. Y. 273; *Wilds v. H. R. R. Co.*, 24 N. Y. 430; *Nash v. N. Y. C. & H. R. R. Co.*, 125 N. Y. 715.)

Albert A. Wray for respondent. As it appears from the record that the affirmance by the Appellate Division was unanimous, this court is compelled by the Constitution and the statute to presume that there was sufficient evidence to sustain the facts found by the jury. (*Ayres v. D., L. & W. R. R. Co.*, 158 N. Y. 254; *Szuchy v. H. C. & I. Co.*, 150 N. Y. 219.) The only questions open to review by this court are the exceptions taken to the rulings relating to evidence and to the charge. (*Ayres v. D., L. & W. R. R. Co.*, 158 N. Y. 254.) It was not negligence for plaintiff to fail to warn the driver of danger that he was himself unaware of. The request to charge was misleading, as it assumed that the signboard and railroad track were "obvious" to plaintiff; whereas that was an issue of fact in dispute, and was for the jury to pass upon. (*Zwack v. N. Y., L. E. & W. R. R. Co.*, 160 N. Y. 362.) Defendant's request to charge that if, on the evidence, the danger sign was in view, etc., had he looked for it, etc., he was negligent as matter of law in not looking and observing the existence of the railroad track, was properly refused. (*McRickard v. Flint*, 114 N. Y. 222; *Judson v. C. V. R. R. Co.*, 158 N. Y. 597; *Zwack v. N. Y., L. E. & W. R. R. Co.*, 160 N. Y. 362.) It was not negligence as a matter of law to drive on the crossing without first stopping. (*Davis v. N. Y. C. & H. R. R. Co.*, 47 N. Y. 400; *Judson v. C. V. R. R. Co.*, 158 N. Y. 597; *Baxter v. T. & B. R. R. Co.*, 41 N. Y. 502.) The charge to the jury, as a whole, was neither contradictory nor confusing, but it submitted the facts to them under clear and intelligible instructions as to the law, which were most favorable to defendant. (*Gillespie v. D. D., E. B. & B. R. Co.*, 12 App. Div. 501; *Hickenbottom v. D., L. & W. R. R. Co.*, 122 N. Y. 91; *Batty v. N. F. H. P. & M. Co.*, 37 App. Div. 94.) The plaintiff and his associates were not

engaged in a joint enterprise with the driver, and his negligence, if any, could not be imputed to plaintiff. (*Robinson v. N. Y. C. & H. R. R. R. Co.*, 66 N. Y. 11; *Dyer v. Erie Ry. Co.*, 71 N. Y. 228; *Kessler v. B. H. R. R. Co.*, 3 App. Div. 426; *Hennessey v. B. R. R. Co.*, 147 N. Y. 721; *Hoag v. N. Y. C. & H. R. R. R. Co.*, 111 N. Y. 199; *Phillips v. N. Y. C. & H. R. R. R. Co.*, 127 N. Y. 657; *Welden v. T. A. R. R. Co.*, 3 App. Div. 370; *Masterson v. N. Y. C. & H. R. R. R. Co.*, 84 N. Y. 247; *Brickell v. N. Y. C. & H. R. R. R. R. Co.*, 120 N. Y. 290; *Callahan v. Sharp*, 3 App. Div. 428.) It was not error to charge that defendant was liable for the engineer's omission to do any act that might have prevented the collision, or lessened the damage to plaintiff, after he saw these horses. (*Schwier v. N. Y. C. & H. R. R. R. Co.*, 90 N. Y. 558; *Spooner v. D., L. & W. R. R. Co.*, 115 N. Y. 22.)

MARTIN, J. The allowance of this appeal does not enable us to examine or determine whether there is any or sufficient evidence to sustain the verdict, inasmuch as the affirmance by the Appellate Division was unanimous. (*Reed v. McCord*, 160 N. Y. 330.) Therefore, the questions of the defendant's negligence and the plaintiff's freedom from contributory negligence cannot be reviewed by this court.

The only questions that can be passed upon by us are those raised by the defendant's exceptions to rulings of the court upon the admission or rejection of evidence, and to its charge or refusals to charge as requested by the defendant. To a proper understanding of these exceptions a brief statement of the facts seems necessary.

This action was for negligence. The plaintiff was injured in a collision which occurred at about two o'clock in the afternoon of the thirty-first day of May, 1897, at a grade crossing of the Merrick road over the defendant's track. The plaintiff, with a number of associates, engaged a tally-ho coach drawn by six horses to convey them from Brooklyn to Valley Stream and return, a distance of about thirty miles. The

horses were gentle and the coach was in order. There were twenty-one persons upon and in it at the time of the accident. The trip was to be made in pursuance of a contract with one Hamilton, a liveryman, to transport the party the round trip for thirty dollars, he to furnish the coach and teams and send them in charge of a competent driver. The teams and coach were entirely under the control of Hamilton's employees, except that the plaintiff and his associates were perhaps authorized to determine where they would stop for lunch. The Merrick road, over which this excursion was to be made, is a smooth macadamized highway to the extent of eighteen feet in width, upon which there is a great amount of travel. The right of way is about fifty feet in width, and outside of the macadamized portion there are ditches and earth which are overgrown with grass and weeds, except about four feet on each side next to the macadamized portion.

At the place of the accident the crossing was planked, so that the spaces between the rails, the rails and the macadamized road on each side of the track presented a smooth even appearance, the top of the rails being even with the roadbed and planking. There was a signboard beyond the crossing which was to some extent obscured by telegraph poles between it and the track. This board, instead of being maintained across the street as required by the statute, was placed upon a single post at the side of and six feet from the edge of the macadamized road. The words painted upon the signboard were not those required by the statute, nor were they of the size prescribed. Section 33 of the Railroad Law requires that such signboards shall be placed, well supported and constantly maintained, *across* each traveled public road or street, where the same is crossed by a railroad at grade; that they shall be so elevated as not to obstruct the travel and so as to be easily seen by travelers, and that on each side shall be painted in capital letters, each at least nine inches in length and of suitable width, the words: "Railroad crossing; look out for the cars." The board which was erected at this place

was upon a single post to which three boards were fastened, one at right angles with the post, the other two extending from the ends of the first to and beyond the post, crossing each other thereon. Upon these boards were painted the words: "Danger, railroad crossing." On the side of the road, back of and extending a considerable distance beyond the signboard, were trees and underbrush from twenty-five to thirty feet high. The proof, while in conflict as to the distance this board could be seen by travelers, tended to show that it could be seen by one who knew of its existence for a considerable distance, while by a stranger who was not aware of its presence, it would not be readily seen or noticed. There were no gates or flagman at this crossing. Upon one of the telegraph poles, standing near the signboard, there was an electric signal bell about ten feet above the ground.

For some distance from the crossing and up to it there are trees, woods and underbrush on both sides of the highway, which upon the left side extend to within eighteen feet of the crossing, obscuring the view of the track from the highway. At a point in the center of the highway thirty-four feet from the track, it could be seen for nearly two hundred and eleven feet from the crossing, and a clear and unobstructed view could be obtained twenty-four and one-half feet from the nearest rail. It was seventy feet from the rear of the coach to the heads of the leaders in the team. While previously there had been considerable jollity among the young people upon the coach, including the blowing of horns and the sounding of a bangle, at the time of the accident no unusual noise was being made, and the team was going slowly, some of the horses upon a walk and the others upon a slow trot.

The plaintiff was seated upon the top of the coach, where he could observe what came within the line of his vision. He had never been over the road before, and knew nothing of the location of the railroad or its crossings. As the coach approached the crossing he looked both ways, but saw nothing to indicate its presence or any approaching danger. The train came from the left of the highway, upon which side there

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were woods obscuring the plaintiff's view. The locomotive was not using steam, and the sound of the train was obstructed or interfered with by the woods. The track was wet from previous rain. A number of witnesses testified that they were in a position to have heard the sounding of the whistle or the ringing of the bell if it had been blown or rung, but that they did not hear either. Upon the other hand, the defendant's witnesses testified that the engine whistled a number of times at different stations and crossings within a few miles of the point where the accident occurred, and that it whistled a quarter of a mile away. They also testified that the engine bell was rung from that distance to the crossing. One of the defendant's employees, or rather a student fireman upon the engine, testified that the whistle was not blown until the train was within four hundred feet of the crossing, and that the fireman was lazily ringing the bell for about eighty rods, but that it did not ring loudly, for the clapper just touched the sides with a slow motion. There was also proof that the automatic signal near the crossing could be heard for a distance of a quarter of a mile when it rang, but that it did not ring on the approach of this train.

The train was moving thirty-five miles an hour, or at the rate of over fifty-one feet per second. The coach was going from five to seven miles an hour, or from about seven to ten feet per second. As the coach approached, no one upon it discovered the crossing or the track until the horses were within about ten feet of the rails. At that time the driver was within fifty feet of the track, the plaintiff sixty-five feet away, and their view of the approaching train was obstructed by the woods. No sound of its approach had been previously heard. At that time, however, one of the party, who stood upon the highest part of the coach, saw the train, cried out, "Here comes a train," and immediately jumped from the side of the coach to the road. He struck the ground about thirty feet from the nearest rail. When the warning was shouted by the young man who jumped off the leaders were over, the body team was just crossing, and the wheelers were

upon the track. Upon discovering the situation, to save himself and his passengers, the driver seized his whip and lashed the team into a jump. The train was late and did not slacken its speed until it struck the coach near the middle, demolishing it, throwing the passengers to the ground and killing or maiming most of them. The plaintiff was thrown a distance of one hundred and twenty-four feet and landed upon a sand pile. He sustained a fracture of the shoulder blade and various bruises and contusions upon his head and other portions of his body. The defendant's engineer testified that he could stop the train within five hundred feet, but it was not stopped until it had passed the crossing, a distance of seven hundred and seventy-five feet. The team was across and the coach was nearly across the track when the collision occurred. The engineer of the defendant saw the horses as they came from behind the woods, but they passed over a distance of twenty-four feet after he saw them before he applied the brakes or undertook to stop the train. He used no sand upon the track, but reversed the engine, which locked the wheels so that they slid, and the train did not stop as soon as it otherwise would.

The plaintiff's associates who made the contract for the team, selected the coach to be furnished for this excursion, and it was decorated with bunting by them. The young men who hired this equipage took a number of young women with them. No particular place had been selected where their luncheon was to be eaten, and previous to the time of the accident they had been looking for a place.

Having thus briefly stated the facts, so far as necessary to a proper understanding of the questions involved, we are brought to the consideration of some of the exceptions taken upon the trial. While we have examined them all, we find but few that require special consideration.

The first and only serious question raised by the exceptions of the defendant relates to the charge of the learned trial judge. At the conclusion of the principal charge the plaintiff requested the court to charge as follows: "If you find that the engineer of the defendant's train, after seeing the

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horses attached to the tally-ho in which plaintiff was seated, omitted to do *any act* which might have prevented the collision, or might have lessened the danger to plaintiff, defendant was guilty of negligence." The court so charged, and the defendant excepted. The appellant now urges that this was error, for which the judgment should be reversed.

The engineer upon the defendant's train first saw the leaders of the team attached to the tally-ho when the train was about four hundred feet from the crossing. It was then running at the rate of thirty-five miles an hour and he did not attempt to stop it until he saw the team coming upon the track, when he applied the emergency brake and reversed the engine. At the rate of speed which the train was running only about eight seconds elapsed after he first saw the horses when the collision occurred. Thus, he was suddenly confronted with an emergency, having but a few seconds in which to take such precautions as were possible to prevent the accident or mitigate the injury. The acts necessary to stop the train were described upon the trial, and the engineer testified as to what was done. The effect of this charge was to instruct the jury that if the engineer omitted any one thing which might have prevented the collision, or lessened the danger, the defendant was guilty of negligence. This, in effect, was an instruction that if it should find that any such act was omitted, then, as a matter of law, the defendant was negligent. This may have presented to the minds of the jury the situation as it existed under the proof and subsequent to the time of the accident. The jury could properly consider only the situation as it was found to have existed when the accident occurred, and in the light of all the facts and circumstances which surrounded the engineer at that time. No one fact or circumstance could be considered by it independently of the others which related to it.

It is often the case that after a transaction has occurred the most careful can discover that a different course of action might have prevented a calamity, or, at least, mitigated the injury. Still, when an emergency presents itself, and a per-

son is under great excitement from the presence of an impending peril, he may not act with that perfect judgment that he would under other and different circumstances and still not be negligent. "Railways are not liable for a mistaken exercise of judgment upon the part of their servants * * * to act with the utmost possible promptitude when the circumstances are such as to afford no time for deliberation." (Patterson's Railway Accident Law, p. 111.) Where an employee of a railroad company is confronted with a sudden emergency the failure on his part to exercise the best judgment the case renders possible does not establish lack of care and skill upon his part, which renders the company liable. (*Wynn v. Cent. P., N. & E. R. R. Co.*, 133 N. Y. 575.) It is not responsible even for his error of judgment. (*Bittner v. Crosstown Rwy. Co.*, 153 N. Y. 76; *Stabenau v. At. Ave. R. R. Co.*, 155 N. Y. 511.)

The charge was in direct conflict with the principle of these authorities. Under the instruction given the jury may have understood that negligence on the part of the defendant might be based upon the omission of the engineer to do any act which it at the time of the trial believed would have prevented the collision or lessened the injury, thus practically ignoring the situation at the time of the accident. The short period of time in which he was obliged to act, the impending danger to his train, to himself, to his passengers and to others, with the consequent excitement attending such a situation, the various acts required to stop or lessen the speed of the train, and all the other circumstances surrounding him at the time, should have been presented to the jury and considered by it before it could properly find the defendant negligent by reason of the acts of its engineer. By the portion of the charge under consideration the jury was permitted to find the defendant negligent without regard to these facts and circumstances, and to hold it liable for any mistaken exercise of judgment upon the part of the engineer. This charge cannot be upheld without disregarding many of the principles of the law of negligence which are thoroughly established by the decisions

of this court. It was clearly erroneous, and requires a reversal of the judgment from which this appeal is taken.

We might well leave the other questions in this case until the necessity for their determination shall be subsequently presented, except for the fact that there are many cases pending where the same questions are involved, one of which is of quite general importance, and was the basis upon which this appeal was allowed.

On the trial the defendant requested the court to charge: "It is negligence as matter of law to drive on to a steam railroad track where the view is obstructed without stopping, looking and listening. The Court: I will not charge it in those words. Mr. Kelly: I except to your Honor's refusal to charge as requested. The Court: I will charge as follows: It is negligence as matter of law to drive on to a steam railroad track where the view is obstructed without looking and listening. Mr. Kelly: I except to your Honor's refusal to charge as requested. The Court: I would say further that whether it is the duty of the traveler to stop depends upon the circumstances of the case, the surrounding conditions and the nature of the vehicle which he is using. I do not say, as matter of law, it is his duty to stop every time; I say there might be conditions under which he ought to stop in the exercise of ordinary care. Whether it was the duty of the plaintiff here to have stopped is for the jury to say, under all the circumstances surrounding this case, considering the condition of the crossing, the obstructions, if any, its situation and the surroundings and the nature of the vehicle which was being used by him. Gen. Tracy: And the defendant excepts to your Honor's charge to that effect." We find no error in this charge, and think the defendant's exceptions were not well taken. This question has been recently before us, and it was held that a person approaching a railroad crossing is not required, as a matter of law, to stop before attempting to cross the track, but his omission to do so is a fact for the consideration of the jury. (*Judson v. Central Vermont R. R. Co.*, 158 N. Y. 597.)

The defendant likewise asked the court to charge that "No negligence can be imputed to the defendant by reason of the size or shape of the danger signal, or the language of the warning, or the length of the letters." This the court declined to charge, and the defendant excepted. It is obvious that, by this request, it sought an instruction to the effect that a disregard of the statute by it as to signboards across streets or highways at its crossings could not be made a basis of negligence. As we have already seen, the statute requires every railroad corporation to cause boards to be placed, supported and maintained across each public road or street, where the same is crossed by a railroad at grade. It also describes, in detail, their height, the manner in which they shall be constructed and maintained, the words which shall be painted thereon, the character of the letters employed, and their length and width. That the sign erected at the crossing where this accident occurred did not comply with the statute there is no doubt. It is equally clear that the one prescribed by the statute would be more readily seen and would more effectually notify an approaching traveler of the existence or situation of the railroad than the one used.

While the omission to comply with the statute in this respect might not constitute actionable negligence, where a person was injured who was familiar with the crossing, and had it in mind at the time, as in such a case the omission would not contribute to his injury, still, where one is injured who is not familiar with the crossing, but is a stranger, wholly ignorant of its existence or of the presence of any signboard, such an omission might constitute negligence which would justify a recovery. Although this precise question has not, to our knowledge, been passed upon by this court, yet, in discussing a somewhat similar question in *Palmer v. N. Y. C. & H. R. R. R. Co.* (112 N. Y. 234, 244), Judge DANFORTH said: "I do not think the court can say, as matter of law, that the statutes which require signals and precautions can be disregarded by the defendant, and it be allowed to claim that the traveler should not be influenced by these omissions." Again

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he says : " Effect must be given to these wise regulations concerning measures to be adopted by a railroad company for the safety of the traveler." We think the same principle should be applied to the omission of a railroad company to comply with the statute requiring signboards at railroad crossings, where no such precaution is taken, or where it is obvious that the precaution provided by the company is less efficient than that required by the statute. We are of the opinion that proof of the omission of a railroad company to comply with this statute is admissible upon the question, and may constitute actionable negligence and justify a recovery where the injury was caused by a disregard of it. This conclusion is sustained by several text writers and by decisions in other jurisdictions where the question has arisen. (Thomas on Negligence, p. 409 ; Patterson's Railway Accident Law, p. 162 ; *Shaber v. St. P., M. & M. Rwy. Co.*, 28 Minn. 103 ; *B. & O. R. R. Co. v. Whitacre*, 35 Ohio St. 627 ; *Elkins v. Boston & A. R. R. Co.*, 115 Mass. 190, 201 ; *Winstanley v. C., M. & St. P. R. Co.*, 72 Wis. 375, 380 ; *Heddles v. Chicago & N. W. R. Co.*, 77 Wis. 228, 232 ; *Haas v. Grand R. & I. R. R. Co.*, 47 Mich. 401.) It follows that the court properly refused to charge upon this subject as requested by the defendant.

The defendant also took the following exception to the main charge : " I except to your Honor's statement of the obligation on the part of the traveler, where you say to the jury that a traveler is bound to exercise ordinary care to avoid the happening of an accident at a steam railroad crossing. I except to that, and ask your Honor to charge the jury that a traveler is bound to use extraordinary care to avoid accidents at a steam railroad crossing and to use all his faculties to determine whether a train is approaching and to avoid it." The court declined to so charge because of the use of the word " extraordinary," and said that aside from that it charged as requested. " Mr. Kelly : Your Honor charges that it was the duty of the traveler to exercise all his faculties to avoid danger ? The court : Yes, I have done that already.

Gen. Tracy: We except to the refusal of your Honor to charge as requested, including the use of the word 'extraordinary.'" We find no error in this ruling. The degree of care which a traveler must observe in approaching a railroad crossing has been recently under consideration by this court, and it was there held that a person approaching such a crossing is not bound to exercise the greatest diligence, but only such as a prudent man approaching such a place would ordinarily exercise under the circumstances. (*Judson v. Cent. Vi. R. R. Co.*, 158 N. Y. 597.)

The only other question that need be specially considered arises upon the defendant's exception to the refusal of the court to charge that the relation of master and servant existed between the plaintiff and his associates and the driver and helper; that the former were responsible for their competency, and that their negligence, if there was any, was imputable to the plaintiff and his associates. In order to establish the liability of one person for an injury caused by the negligence of another, it is not enough to show that the latter was, at the time, acting under an employment by the former; it must be shown in addition that the employment created the relation of master and servant. (*Hexamer v. Webb*, 101 N. Y. 377; *King v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 184; *Butler v. Townsend*, 126 N. Y. 105.) In the latter case Judge FINCH said that the relation of master and servant exists where the employer selects the workman, may remove or discharge him for misconduct, and may not only order what work shall be done but the manner and mode of performance.

The plaintiff in the case at bar did not hire or pay the driver or attendant, and had no voice in the selection of either, which was an important element in determining the relation between them. The fact that the driver may have received from the plaintiff or his associates orders when to go forward and stop, did not make the plaintiff the servant of the defendant. (*Johnson v. N. A. S. N. Co.*, 132 N. Y. 576.) No farther discussion of the question is necessary at this time, as we have recently had this subject under consideration. (*Murray v.*

Dwight, 161 N. Y. 301.) It is manifest that under the principles established by the decisions of this court the relation of master and servant did not exist between the plaintiff and the driver or helper, or either of them.

After carefully and studiously examining the great number of perplexing and difficult questions determined during the heat and excitement of a sharp and protracted trial, we can but admire and commend the scrupulous and intelligent care and ability evinced by the trial judge, and the almost unerring correctness of his rulings. When the number and variety of the questions raised are considered, we are surprised, not that a single error was committed, but that there were not many more.

The judgment and order should be reversed and a new trial ordered, with costs to abide the event.

PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT, HAIGHT and VANN, JJ., concur.

Judgment and order reversed, etc.

THE BUFFALO LOAN, TRUST AND SAFE DEPOSIT COMPANY,
Respondent, v. THE MEDINA GAS AND ELECTRIC LIGHT
COMPANY and THE HOLLAND TRUST COMPANY, Appellants.

1. CORPORATIONS. The title to the property of a company is in the fictitious entity called the corporation, and its officers and agents only have authority to act for it.

2. CORPORATE BONDS—UNLAWFUL DIVERSION. The transfer of corporate bonds by the secretary of the corporation to the mortgage trustee, as collateral security for an individual loan to him by the latter, the day after the trustee by its secretary signed the certificates upon the bonds, is an unlawful diversion of the bonds, notwithstanding that the secretary of the mortgagor corporation owned all but two of the shares of the capital stock, where the bonds were issued under a resolution, spread upon the face of the mortgage securing them, providing for the borrowing of money to pay the corporation's existing indebtedness and for other lawful purposes, and authorizing the president to negotiate the bonds.

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3. **BONA FIDE HOLDER—INQUIRY.** A bank which, after levying an attachment on the interest of its debtor in bonds of a corporation of which he was the secretary, and the owner of all but two of its shares of capital stock, at his request, paid his private indebtedness to the trustee in the mortgage securing the bonds, and took a transfer of them from the latter, with which they had been unlawfully pledged as collateral security for the debt, is not bound, in order to acquire the status of a *bona fide* holder, to make any further inquiries after being informed by the secretary of the corporation and the secretary and treasurer of the trustee that the bonds were good and valid securities, notwithstanding that eight coupons, representing past-due semi-annual installments of interest accruing while the bonds were in pledge, were still attached thereto and apparently unpaid, the other stockholders, who were directors, not appearing to have actively participated in the affairs of the corporation.

4. **PAST-DUE INTEREST COUPONS.** Corporate bonds do not stand dishonored upon their face and deprived of their negotiability so as to prevent a transferee from acquiring the status of a *bona fide* holder, because eight coupons representing past-due unpaid installments of interest are attached thereto, notwithstanding that the bonds provide that they shall become due, principal and interest, upon default in payment of any installment of interest for six months after maturity and demand.

5. **TRANSFER AFTER DEFAULT IN INTEREST—DEMAND.** The court will not, in order to deprive one of the status of a *bona fide* holder of corporate bonds, assume that a demand for the payment of past-due interest had been made so as to mature the bonds before the purchase, merely because of the commencement, before that time, of a suit to foreclose the mortgage securing the bonds which, for some undisclosed reason, was discontinued.

Buffalo Loan, T. & S. D. Co. v. Medina Gas & El. L. Co., 12 App. Div. 199, affirmed.

(Argued January 30, 1900; decided February 27, 1900.)

APPEAL from a judgment and order of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 30, 1896, modifying and as modified affirming a judgment in favor of plaintiff, entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

Louis Marshall for appellants. The conclusion of the referee, that the transfer of the bonds by Stranahan to the plaintiff as collateral security for his own debt, was an unauthorized diversion thereof from the purposes for which they were issued, and did not give to the plaintiff title to the same as owner, and the findings of fact upon which that conclusion is based, must be deemed controlling on this appeal. (*S. Nat. Bank v. Poucher*, 56 N. Y. 348; *Monnet v. Merz*, 127 N. Y. 151; *Cooke v. U. Mfg. Co.*, 138 N. Y. 610; *Place v. Hayward*, 117 N. Y. 492; *Wangler v. Swift*, 90 N. Y. 38.) The mortgage in suit never having been delivered by Mr. Robertson, the president, to the mortgagee, the bonds not having been negotiated by him, and the Medina Gas Light Company never having obtained any of the proceeds thereof or derived any benefit whatsoever therefrom, they never became binding obligations upon it. (*G. S. Bank v. Vil. of Suspension Bridge*, 73 Hun, 590; *Shaw v. S. H. N. Co.*, 144 N. Y. 220; *Decker v. Mathews*, 12 N. Y. 313; *Comstock v. Hier*, 73 N. Y. 269; *Farnham v. Benedict*, 107 N. Y. 159; *People v. A. B. T. Co.*, 117 N. Y. 241; *Fitzgerald v. M. P. Ry. Co.*, 45 Fed. Rep. 812; *Parker v. B. Co.*, 96 Tenn. 252; *C. T. Co. v. Kneeland*, 138 U. S. 414; *T., D. & B. R. R. Co. v. Hamilton*, 134 U. S. 296; *Nat., etc., Co. v. Kansas City*, 78 Fed. Rep. 428.) The plaintiff never acquired the title of *bona fide* holder of the bonds pledged to it by Stranahan. (*Pendleton v. Fay*, 2 Paige Ch. 202; *Shaw v. Spencer*, 100 Mass. 388; *Garrard v. P. & C. R. R. Co.*, 29 Penn. St. 154; *Wilson v. M. E. Ry. Co.*, 120 N. Y. 145; 1 Cook on Corp. § 293; *Farrington v. S. B. R. Co.*, 150 Mass. 406; *Moore v. Citizens' Bank*, 111 U. S. 156; *G., etc., Co. v. Boynton*, 71 Fed. Rep. 797; *Bank of N. Y. N. B. Assn. v. A. D. & T. Co.*, 143 N. Y. 559; *Duncomb v. N. Y., H. & N. R. R. Co.*, 84 N. Y. 191.) The German-American Bank never became the *bona fide* holder of these bonds, but took them after they had matured, and under circumstances which put it upon its inquiry. (*F. Nat. Bank v. Green*, 43 N. Y. 298; *Seymour v. McKinstry*, 106 N. Y. 230; *Vosburgh v.*

Diefendorf, 119 N. Y. 357; *C. Nat. Bank v. Diefendorf*, 123 N. Y. 191; *Newell v. Gregg*, 51 Barb. 263; *Fisher v. Leland*, 4 Cushi. 456; *Morgan v. United States*, 113 U. S. 500; *Morss v. Gleason*, 64 N. Y. 208; *Texas v. White*, 7 Wall. 700; *Parsons v. Jackson*, 99 U. S. 440.)

Tracy C. Becker for respondent. The pleadings admit that the issue of the bonds in suit was valid and regular. (*C. S. & A. Assn. v. Read*, 93 N. Y. 474; *P. Mfg. Co. v. J., I. & C. Co.*, 33 Hun, 143; *Lloyd v. Burns*, 6 J. & S. 423; 62 N. Y. 651; *Swinburne v. Stockwell*, 58 How. Pr. 312; *Powers v. R., W. & O. R. R. Co.*, 3 Hun, 285; *Elton v. Markham*, 20 Barb. 343; *O'Brien v. Catlin*, 1 C. R. [N. S.] 273; *Wood v. Staniels*, 3 C. R. [N. S.] 152; *Conselyea v. Swift*, 103 N. Y. 604; *Trustees, etc., v. McKechnie*, 90 N. Y. 618.) The judgment below must be affirmed, because the Buffalo Loan, Trust and Safe Deposit Company acquired good title to the bonds in suit when first pledged to it. (L. 1884, ch. 367, § 6; *Kent v. Q. M. Co.*, 78 N. Y. 185; *Welch v. I. & T. Nat. Bank*, 122 N. Y. 177; *Morawetz on Priv. Corp.* § 625; 4 *Thomp. on Corp.* § 5285; *E. C. Ry. Co. v. Hawkes*, 5 H. L. Cas. 331; *Mayor, etc., v. M. R. Co.*, 143 N. Y. 26; *S. H. B. Co. v. E. H. B. M. Co.*, 90 N. Y. 607; *Rogers v. Pell*, 154 N. Y. 518; *R. R. Co. v. Howard*, 7 Wall. 393, 415; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; *Hotel Co. v. Wade*, 97 U. S. 13; *Pierce v. Somerset Ry. Co.*, 171 U. S. 641.) If the plaintiff, when it took the bonds from Stranahan in pledge for his individual debt, was put upon its inquiry because of that fact, the inquiry, if made, would have revealed nothing tending to impugn the validity of the bonds, and the original pledge to the plaintiff was, therefore, valid. (*Cheever v. P. R. R. Co.*, 150 N. Y. 59; *Titus v. G. W. Turnpike Co.*, 61 N. Y. 237; *Bank of N. Y. N. B. Assn. v. A. D. & T. Co.*, 143 N. Y. 559; *Wilson v. M. E. Ry. Co.*, 120 N. Y. 145; *F. A. Bank v. F. S. S. & G. S. F. R. R. Co.*, 137 N. Y. 231; *Hanover Bank v. A. D. & T. Co.*, 148 N. Y. 612.) Whatever may have been the position of the Buffalo Loan,

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Trust and Safe Deposit Company, the German-American Bank, which is the real plaintiff in this case, stands in the position of an absolutely *bona fide* holder of the bonds, and the referee's finding to that effect must stand. (*White v. Benjamin*, 150 N. Y. 258; *People ex rel. v. Barker*, 152 N. Y. 417; *Cromwell v. Sac County*, 96 U. S. 51; *Nat. Bank v. Kirby*, 108 Mass. 497; *Railway Co. v. Sprague*, 103 U. S. 756.)

BARTLETT, J. This action was brought to foreclose a mortgage executed by the Medina Gas Light Company to the plaintiff, the Buffalo Loan, Trust & Safe Deposit Company, as trustee, under date of September 15, 1886.

The action was instituted at the request of the German-American Bank of Buffalo, as alleged owner of ten bonds of a thousand dollars each, secured by the mortgage.

A joint answer was interposed on behalf of the Medina Gas & Electric Light Company and the Holland Trust Company of the city of New York.

The original mortgagor, the Medina Gas Light Company, was duly consolidated in 1891 with the Medina Electric Company and assumed the name of the Medina Gas & Electric Light Company, the new company assuming all of the obligations of the old corporations. After such consolidation the Medina Gas & Electric Light Company executed a second mortgage to the Holland Trust Company of New York, to secure the sum of \$75,000 in bonds.

The contest in this action grows out of the claim made on behalf of the Holland Trust Company that as matter of law its lien is superior to that of the first mortgage.

The capital stock of the Medina Gas & Electric Light Company consisted of 300 shares of the par value of \$100 each, and at the time of issuing the first mortgage, and for some years thereafter, one Robert A. Stranahan was the owner of 298 shares; Horace Bacon one share and James Robertson one share; Robertson was the president of the company and Stranahan the secretary, and the three shareholders were the directors.

On the 15th day of September, 1886, at a meeting of the directors, the issuance of the ten bonds and the mortgage securing the same was duly authorized by resolution, which, among other things, provided: "*Resolved*, that the president cause such bonds and mortgage to be prepared in such form and containing such conditions as he shall deem proper, and when prepared he cause the corporate seal to be affixed thereto and execute the same under his hand, attested by the signature of the secretary, and that when the same be so prepared and executed he make delivery of such mortgage and negotiate the said bonds upon the best terms possible."

In pursuance of this resolution, and on the 15th day of September, 1886, the officers of the company duly executed the bonds and mortgage, and on the 20th of September, 1886, the plaintiff, by its secretary, duly signed the mortgage and accepted the trust therein reposed in it. The president and secretary of the mortgagor company did not acknowledge the execution of the mortgage until the 18th of September, 1886.

The bonds are due on the 15th day of September, 1906, with interest at six per centum per annum, payable semi-annually, at the office of the plaintiff on the 15th days of March and September in each year. Coupons were duly attached to each bond representing these interest payments.

The bonds provided that in case default should be made in the payment of any semi-annual installment of interest, and it continued for the period of six months after the interest became due and had been demanded, principal and interest of all the bonds should become due.

On the 21st day of September, 1886, the day following the date that the plaintiff, by its secretary, signed the certificate upon each of the ten bonds, Stranahan pledged to the plaintiff all of the bonds as collateral security for an individual loan of \$6,000, made to him by the plaintiff that day. Stranahan was at that time indebted to the plaintiff in the further sum of \$6,000, and it held as collateral to that loan stock of the Tonawanda Gas Light Company, which stock was also pledged to the plaintiff for the new loan of \$6,000. The

plaintiff afterwards made further loans to Stranahan until his indebtedness amounted to the sum of \$14,650.

The findings of the referee are in substance as follows, viz.: The only delivery ever made of said mortgage by the mortgagor to the plaintiff was by Stranahan to Clark, the secretary of the plaintiff, on the day the mortgage was presented to Clark for signature and acceptance of the trust therein contained, and the only delivery of the bonds to the plaintiff was on the same day, by Stranahan, at the time he pledged them to the plaintiff for his individual loan of \$6,000. There is no evidence that any of the moneys advanced by the plaintiff to Stranahan was applied by him to any of the purposes recited in the resolution, by virtue of which the mortgage was executed and the bonds issued, and there is no evidence that Stranahan had any power or authority from the Medina Gas Light Company to pledge the bonds for his individual debt; the plaintiff received the same with notice that Stranahan had no such power or authority.

The referee found as a conclusion of law that this transfer of the bonds was an unauthorized diversion from the purposes for which they were issued, and did not give the plaintiff title to the same as against the Medina Gas Light Company.

It will be observed that the plaintiff occupies a dual position in this case, to wit: Trustee under the first mortgage and a holder of the ten bonds as collateral security for the loan made to Stranahan individually.

More than four years later, and on the 27th of December, 1890, Stranahan was indebted to the German-American Bank, doing business in Buffalo, in the sum of \$8,000 and interest. On the day last mentioned the German-American Bank commenced an action, by attachment and publication of summons, against Stranahan, and caused the warrant of attachment to be levied upon the interest of Stranahan in 305 shares of the stock of the Tonawanda Gas Light Company and the said \$10,000 of bonds of the Medina Gas Light Company then in the possession of the plaintiff.

Almost immediately the German-American Bank discontinued this action, withdrew its attachment and paid to the plaintiff the sum of \$14,650, in which sum Stranahan was indebted to it at that time, and received the Tonawanda Gas Light Company stock and the ten bonds of the Medina Gas Light Company, held as collateral for the debt so paid.

At the time the German-American Bank paid this money to the plaintiff, it did so at the request of Stranahan, who was still the owner of 298 shares of the capital stock of the Medina Gas Light Company, and upon his representation and the representation of Charles E. Clark, secretary and treasurer of the plaintiff, that the bonds were good and valid securities.

It further appears that at the time the German-American Bank paid the money to the plaintiff, it had no notice of any irregularity or illegality in the issue of the bonds originally, except such notice as might arise from the fact that all of the coupons which fell due on the 15th of March, 1887, to and including the coupons which fell due on the 15th of September, 1890, were attached to the bonds and apparently unpaid.

The referee also finds in detail the transactions between the German-American Bank and Stranahan and one Linley, who appears to have been associated with him in business early in 1891, and the final result was that after the bank had brought its action in September, 1892, against Stranahan and Linley and sold the collateral security that it held, there was still due to the bank the sum of \$16,150.96.

Prior to the commencement of this action the plaintiff was requested by the German-American Bank, of Buffalo, to begin foreclosure of the first mortgage, and such an action was commenced about December 13th, 1889, but subsequently discontinued.

The second mortgage to the Holland Trust Company was executed and delivered in April, 1891.

The referee found as a conclusion of law that the transfer of the ten bonds by the plaintiff to the German-American Bank, and the payment by the bank to plaintiff of Stranahan's indebtedness of \$14,650, rendered the bank a *bona fide* pur-

chaser of the bonds and that the plaintiff was entitled to a judgment of foreclosure and sale in the usual form.

As the decision of the Appellate Division was unanimous, the facts as found cannot be reviewed in this court.

While we think this judgment should be affirmed, we are unable to agree with the reasoning in the opinion of the learned Appellate Division in regard to the original negotiation of the bonds by Stranahan to the plaintiff. We agree with the legal conclusion of the referee that when Stranahan transferred the bonds to the plaintiff as collateral security for his own debt it was an unauthorized diversion of them from the purposes for which they were issued.

The resolution under which the bonds and the mortgage securing them were issued, provides in part as follows: "*Resolved*, That it has become necessary for this company to borrow, and that it will borrow, the sum of ten thousand dollars for the purpose of defraying its existing indebtedness and for its other lawful purposes."

The entire resolution is spread upon the face of the mortgage.

The ink was hardly dry on the signature of the plaintiff accepting the trust contained in the mortgage, when Stranahan, the secretary of the mortgagor, applied for an individual loan on these as yet unissued bonds, as collateral security, and the plaintiff, with full knowledge of the purposes for which the mortgage and the bonds secured by it were issued, granted his request.

The referee, with great forbearance, lightly characterized this transaction as an "unauthorized diversion."

The opinion of the Appellate Division, in referring to the contention that Stranahan was not authorized to negotiate the bonds, uses this language: "This contention is clearly untenable. Stranahan was practically the owner of the entire capital stock of the company, and, if we are to believe the testimony of Curry, the superintendent, the other two directors took no active part in the management or control of its business affairs. * * * The conclusion is fully warranted by

the evidence that Stranahan was lawfully in possession of the bonds and with ample authority to dispose of them."

The learned court then comments upon the reasons of the referee for holding that the plaintiff was not a *bona fide* purchaser of the bonds as to the mortgagor, and that Stranahan had no authority to pledge them for his debt and then continues: "The answer to this reasoning is that Stranahan did, in fact, possess authority from his co-directors and stockholders, who with himself constituted the corporation and owned all its assets, to negotiate the bonds; consequently, the matter must be judged as though the secretary, instead of the president, were designated in the resolution for such purpose. * * * Clearly the referee's conclusion that the transaction amounted to a diversion of the securities, is founded in error."

In affirming this judgment we dissent from this reasoning. To hold that Stranahan was lawfully in possession of the bonds so that he could pledge them as collateral security for his individual debt with the trustee of the mortgage securing the bonds, because he was "practically the owner of the entire capital stock" of the company, is to confuse the powers of the corporation as a legal entity with the rights of its stockholders.

Stranahan was not acting as secretary of the company in disposing of the bonds, and his ownership of a large portion of the capital stock gave him no power to make a good title to the corporate property. The title to the property of a company is in the fictitious entity called the corporation, and if all the stock were owned by a single person he could not by his conveyance affect the legal title. (Morawetz on Corp. § 233.)

The entire management of the affairs of a corporation is delegated by its shareholders to the care of the corporate agents. Only the regular officers and agents whose appointment was provided for, expressly or impliedly, by the charter, have authority to act for it; the individual shareholders, as such, have no power either to represent the body corporate, or to bring suit in its behalf, or to interfere in any way with its management. (Morawetz on Corp. § 238.)

As an officer of the company Stranahan held the bonds to raise money for corporate purposes, and when he used them for his individual benefit he became a naked wrongdoer without title.

The remaining question is whether the German-American Bank became the *bona fide* holder of these ten bonds under the findings of fact to which we have already adverted.

As this finding is brief we quote it in full: "*Eleventh.* That at the time the said German-American Bank paid said money to the plaintiff, it did so at the request of said Robert A. Stranahan, who was at that time the owner of 298 shares of the capital stock of the Medina Gas Light Company, and upon his representation and upon the representation of Charles E. Clark, the secretary and treasurer of the plaintiff, that the said bonds were good and valid securities."

It was also found that the bank had no notice of any irregularity or illegality in the issue of the bonds, except such notice as might arise from the fact that all of the coupons from March, 1887, to September, 1890, were attached to the bonds and apparently unpaid.

It is undisputed that the bank advanced in good faith to the plaintiff the sum of \$14,650, the amount of Stranahan's indebtedness to plaintiff, and took up the collateral security which included these bonds.

It remains to consider whether the bank made proper inquiry as to the bonds being good and valid securities as against the mortgagor; also, the effect of unpaid coupons being attached to the bonds.

It is difficult to see what further inquiry could have been made which would have added anything to the information received from the secretary of the mortgagor and the secretary and treasurer of the trustee corporation, the plaintiff.

The two remaining directors of the mortgagor held only one share of stock each, and do not appear to have actively participated in the affairs of the corporation.

We agree that the duty of making inquiry was fully discharged by the bank.

The next question is whether the eight unpaid interest coupons attached to the bonds caused them to stand dishonored upon their face and to lose their negotiable quality.

We are not aware that any leading case holds this extreme doctrine. The presence of due and unpaid coupons on the bond is sufficient to put the purchaser on inquiry, but they do not of themselves make the bond to which they are attached dishonored paper. (*Railway Co. v. Sprague*, 103 U. S. 756; *Cromwell v. County of Sac*, 96 U. S. 51.)

It is also to be borne in mind that the bank must have ascertained, when prosecuting its inquiry, that, during the period covered by the unpaid coupons, the bonds had been held in pledge by the plaintiff.

The learned counsel for the defendants insisted upon the argument that the bonds had matured as matter of law.

The bonds, as drawn, do not fall due until 1906, and we find nothing in the record to show that they have become due by reason of non-payment of interest continuing for six months after default and demand.

The appellants' counsel suggest that the suit begun by plaintiff in 1889, to foreclose the first mortgage, is of itself evidence that the bonds were due by reason of six months' continuing default after demand. It appears, however, that this suit was discontinued, but the motive is not disclosed. It may have been for the reason that no demand had been made and the principal was not due. It certainly cannot be assumed without proof that demand had been made so as to authorize the institution of the suit. Furthermore, it is possible that the discontinuance of the action might be regarded as a waiver of the default. It is sufficient answer to this contention of the appellants that no demand is found by the referee prior to the time that the German-American Bank acquired title to these bonds.

We are of opinion that the German-American Bank is a *bona fide* purchaser of the ten bonds before maturing, and took them freed from all infirmities in their origin.

The defendant, the Holland Trust Company, holds its

bonds secured by a mortgage, the lien of which is subject to the first mortgage securing these bonds, duly recorded September 22d, 1886.

The modification by the Appellate Division of the judgment entered upon the referee's report as to interest is not challenged on this appeal.

The judgment and order appealed from should be affirmed, with costs.

PARKER, Ch. J., GRAY, MARTIN, VANN, CULLEN and WEBNER, JJ., concur.

Judgment and order affirmed.

BENJAMIN F. STEPHENS, Appellant, v. SARAH M. ELY et al.,
Respondents.

1. LEASE — RIGHT TO REMOVE FIXTURES. The right to remove fixtures by virtue of a parol contract subsequent to a lease is lost by failing to exercise it during the term and by entering into a new lease which does not preserve the right, but contains a covenant by the lessees to return the premises in as good a state as reasonable use and wear will permit, and a provision authorizing them to make such alterations as they deem necessary for their business, they agreeing to restore the premises to their present condition.

2. APPEAL — EXCEPTION. Appellate courts should not be diligent in seeking a way to deprive a party of the benefits of an exception pointing out error, where it appears that the trial court was fully apprised of the nature of the objection.

3. FAILURE TO REPEAT. The suggestion to counsel by the trial justice, in the interest of expedition and orderly procedure, that one exception is as good as many, acquiesced in by them, should not be allowed to operate as a trap to ensnare the rights of clients.

Stephens v. Ely, 14 App. Div. 202, reversed.

(Argued February 2, 1900; decided February 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 12, 1897, affirming a judgment in favor of defendants entered upon a verdict, and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Charles N. Morgan for appellant. The trial court erred in admitting testimony "with a view of ascertaining whether or not the entire agreement of the parties was reduced to writing" after the written lease and the correspondence of the parties in relation thereto had been offered and received in evidence. (*Engelhorn v. Reitlinger*, 122 N. Y. 76; *Case v. P. Bridge Co.*, 134 N. Y. 78; *Mott v. Richtmyer*, 57 N. Y. 49; *Martin v. Cole*, 104 U. S. 30; *Strong v. Waters*, 80 Hun, 73; *Johnson v. Oppenheim*, 55 N. Y. 293; *Chapin v. Dobson*, 78 N. Y. 74; *Fillo v. Jones*, 4 Keyes, 328; *Quinby v. Strauss*, 90 N. Y. 664; *Tooley v. Bacon*, 70 N. Y. 34.) The court erred in permitting, against the objection of the plaintiff, the witness Arthur H. Ely to testify to a conversation had in December, 1887, showing or tending to show an agreement on the part of the plaintiff that the defendants might remove the fixtures in question at the termination of the first lease. (*Loughran v. Ross*, 45 N. Y. 792; *Talbot v. Cruger*, 81 Hun, 504; 151 N. Y. 120.)

Arthur H. Ely and *Justus A. B. Cowles* for respondents. The learned trial judge did not err in his ruling as to the admissibility of certain testimony to establish the existence of the verbal agreement under which the defendants might lawfully remove certain fixtures. (*People v. Beach*, 87 N. Y. 508; *Quinby v. Strauss*, 90 N. Y. 664; *People v. Place*, 157 N. Y. 584; *Grattan v. M. L. Ins. Co.*, 92 N. Y. 274; *Brady v. Nally*, 151 N. Y. 258; *Eighmie v. Taylor*, 98 N. Y. 288; *Rutledge v. Worthington Co.*, 119 N. Y. 592; *Chapin v. Dobson*, 78 N. Y. 74.) The exceptions to the admission of testimony tending to show the existence of a verbal agreement in relation to the removal of the fixtures present no error of law. (*Rouse v. Whited*, 25 N. Y. 170; *Grattan v. M. L. Ins. Co.*, 92 N. Y. 274; *Klock v. Brennan*, 82 Hun, 262; *Todd v. Vaughan*, 90 Hun, 70, 73; *House v. Burr*, 24 Barb. 525; *W. T. Co. v. Lansing*, 49 N. Y. 499, 506.) The new

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articles of convenience, attached to the plumbing by the defendants, were, under the circumstances and in the nature of things, movable fixtures, which the defendants could have removed irrespective of any agreement allowing them so to do. (2 R. S. 82, § 6, subd. 4; *Potter v. Cromwell*, 40 N. Y. 287; *McKeage v. H. F. Ins. Co.*, 81 N. Y. 38; *Manning v. Ogden*, 70 Hun, 399.)

PARKER, Ch. J. When the defendants left the premises, which they had occupied for a number of years as tenants of the plaintiff, they took with them certain fixtures, the value of which the plaintiff seeks to recover in this action.

In August, 1887, the first lease of the premises was executed, the term to begin September first, 1887, and to end May first, 1889. The defendants entered into possession, using the premises as a boarding school for young ladies. In a very short time thereafter some of the pupils became ill, an investigation of the condition of the plumbing followed, and the defendants offered to put in new plumbing, provided the plaintiff would consent that the title thereto should continue in them and they be permitted to remove the same, conditioned only that they should restore the premises to their former state. This offer was accepted, and in pursuance of this agreement the fixtures which are the subject of this controversy were put in by the defendants.

When the evidence to establish this oral agreement and the putting in of the fixtures thereunder was offered, the plaintiff's counsel objected, but his objection was overruled, as we think, erroneously. If the defendants had removed the fixtures at any time before the expiration of the first lease, the ruling of the court would have been correct and the objection that the writing expressed the contract between the parties and could not be affected by parol, would not have been well taken; for it constituted a new and independent agreement made subsequent to the lease, an agreement that the parties were entirely competent to make, and by it the fixtures remained, subject to the right of the defendants to sever them

from the building at any time prior to the completion of the term. There was one other way by which the defendants could have preserved the right existing under the first lease to remove the fixtures during a period covered by a subsequent lease, and that was by incorporating into the new lease a statement that the right to remove such fixtures was to continue during the new term. These defendants did not remove the fixtures during the period covered by the first lease; instead they leased the premises for a year from May first, 1889, with the privilege of two renewals of one year each, and in the new lease no reservation of the right to remove the fixtures was made, nor was the subject mentioned. The lease contained the usual covenants to surrender the premises demised in as good state and condition as reasonable use and wear would permit, and a special provision authorizing the premises to be used for a private boarding school and permitting the lessee "to make such alterations as they deem necessary for the purpose of their business, they agreeing hereby to restore the premises to their present condition." The legal effect of such action was to destroy the right of removal of the fixtures which, prior to the expiration of the first term, had existed in the defendants.

This subject was carefully considered by this court in *Loughran v. Ross* (45 N. Y. 792), where it is declared to be the law of this state that if a tenant continues in possession under a new lease where nothing is said as to fixtures, his right to remove fixtures is terminated, the taking of the new lease being treated as equivalent to a surrender of the premises as they then existed to the landlord, and a taking of them from him in the condition in which at the end of the lease the tenant is bound to surrender them.

This principle is again enunciated in *Talbot v. Cruger* (151 N. Y. 117), in which the court says: "A tenant may remain in possession after the old lease has expired; but unless he reserves the right under the new lease to remove the fixtures upon the land, the right will be deemed to have been abandoned and they will become the property of the landlord."

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It is urged, however, that there is an opportunity to distinguish this case from *Loughran v. Ross* and similar cases, in that the agreement was independent of the lease, and the method proposed is to construe the new lease as not including the fixtures, which the parties knew belonged to the tenant and not to the landlord. The answer is that an oral agreement made after a lease, that title to, and right of removal of, all fixtures put in by the tenant during his term shall remain in him, is neither more comprehensive nor more effective than an agreement expressed in the lease that the title to all fixtures put in by the tenant during his term shall remain in him with the right of removal at the end. As in the latter case the title and right of removal are lost, as we have seen, by taking a new lease without any reservation of the right of removal of the fixtures, it follows that the result in the former case must be the same.

The appellant's objections have been carefully analyzed with a view of convincing this court either that they failed to point out the true ground for refusing the testimony, or that they were not made as promptly as they should have been, by reason of which it is said the plaintiff's rights were lost. A careful examination of the record has led us to the conclusion that neither position is well taken.

Appellate courts should not be diligent in seeking a way to deprive a party of the benefit of an exception pointing out error, where it appears that the court was fully apprised of the nature of the objection. The every-day suggestion to counsel by trial judges, in the interest of expedition and orderly procedure, that one exception is as good as many, a suggestion promptly acquiesced in by the gentlemen of the profession, should not be allowed to operate as a trap to ensnare the rights of a client intrusted for protection, in all confidence, to the care and skill of chosen counsel.

The judgment should be reversed and a new trial granted, with costs to abide the event.

GRAY, BARTLETT, VANN, CULLEN and WERNER, JJ., concur; MARTIN, J., not voting.

Judgment reversed, etc.

162	84
164	880
164	548

162	84
169	*183

162	84
170	*168

WILLIAM J. TRIMBLE, as Assignee of EUGENE T. CURTIS et al.,
for the Benefit of Creditors, Respondent, v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

1. RAILROAD — LIABILITY FOR LOSS OF TRUNK CONTAINING MERCHANDISE — NOTICE THAT IT CONTAINS GOODS, NOT BAGGAGE, A QUESTION OF FACT. A railroad company is liable to the assignee of a commercial firm for the loss of a trunk containing merchandise in charge of its traveling salesman, and which is checked as baggage upon one of its passenger trains, in an action upon an independent agreement for its transportation as freight, when the company has notice through its agent that it contains goods and not baggage — and this may be given by other means than the direct statement of the salesman, when he seeks to check it, that the trunk contains merchandise, as it may be inferred from the facts surrounding the transaction which are properly submitted to the jury or to the trial court upon the question.

2. FAILURE OF BAGGAGEMAN TO COMPLY WITH RULE REQUIRING RELEASE FROM LIABILITY. When with notice that a trunk contains merchandise, the baggageman of a railroad company, contrary to one of its rules, which is unknown to the salesman, checks it as baggage without exacting a release from liability, the company will not be relieved from responsibility for its loss as freight, as the baggageman stands in the place of the company and it is bound by his acts.

3. DIRECTION OF VERDICT. Where, after a nonsuit has been denied at the close of the whole case, the counsel for the plaintiff states that he is willing to leave it to the court, and the defendant's counsel, upon being interrogated by the court, says he has no question to submit to the jury, but that he "stands on" his motion for a nonsuit, the legal effect is the same as if both counsel had requested the court to direct a verdict; and where a verdict has been directed in favor of the plaintiff, although the defendant excepted thereto, all the controverted facts and all inferences in support of the judgment entered thereon will be deemed conclusively established in his favor.

Trimble v. N. Y. C. & H. R. R. R. Co., 89 App. Div. 408, affirmed.

(Argued January 17, 1900; decided February 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 23, 1899, upon an order overruling the defendant's exceptions, directed to be heard at the Appellate Division in the first instance, and directing judgment for the plaintiff on a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

Albert H. Harris for appellant. The defendant was not liable for the loss of the samples, and the plaintiff should have been nonsuited. (*Talcott v. W. R. R. Co.*, 159 N. Y. 461; *Sloman v. G. W. Ry. Co.*, 67 N. Y. 208; *Cahill v. L. & N. Ry. Co.*, 10 C. B. [N. S.] 154; *Becker v. G. E. Ry. Co.*, L. R. [5 Q. B.] 241; *G. N. R. Co. v. Shepherd*, 8 Exch. 30; *B. & B. M. Ry. Co. v. Keys*, 9 H. L. Cas. 555; *Lee v. G. T. Ry. Co.*, 36 U. C. Q. B. 350; *Macrow v. G. W. Ry.*, L. R. [6 Q. B.] 612; *Blumantle v. F. R. R. Co.*, 127 Mass. 322; *Alling v. B. & A. R. R. Co.*, 126 Mass. 121.) Under the contract for passage the defendant is not liable for damage to this trunk. (*Gurney v. G. T. Ry. Co.*, 37 N. Y. S. R. 155; 138 N. Y. 638; *O. C. Bank v. Brown*, 9 Wend. 116; *Hawkins v. Hoffman*, 6 Hill, 586.)

David Hays for respondent. The defendant having received the trunk, with notice that it contained property other than the personal baggage of the passenger, and having charged and received extra compensation for its transportation, it is liable for its loss. (*Smith v. Weston*, 159 N. Y. 194; *Adams v. R. L. Co.*, 159 N. Y. 176; *Sloman v. G. W. Ry. Co.*, 67 N. Y. 208; *Talcott v. W. R. R. Co.*, 159 N. Y. 461; 4 Elliott on Railroads, § 1649; Hutchinson on Carriers, § 269; Lawson on Bailments, § 284; *Rathbone v. N. Y. C. & H. R. R. Co.*, 140 N. Y. 48; *L. S. & M. S. Ry. Co. v. Foster*, 104 Ind. 293.) It is no defense that the property destroyed was not the property of the plaintiff. (*Talcott v. W. R. R. Co.*, 159 N. Y. 461; *Sloman v. G. W. Ry. Co.*, 67 N. Y. 208; *Fairfax v. N. Y. C. & H. R. R. Co.*, 73 N. Y. 167.) The defendant is liable on the ground of negligence. (*Fairfax v. N. Y. C. & H. R. R. Co.*, 73 N. Y. 167; *Canfield v. B. & O. R. R.*, 93 N. Y. 532; *Catlin v. Adirondack Co.*, 11 Abb. [N. C.] 377; *Curtis v. D., L. & W. R. R. Co.*, 74 N. Y. 116; *Wheeler v. O. S. N. Co.*, 125 N. Y. 155; *Meux v. G. E. R. R. Co.*, L. R. [2 Q. B. 1895] 387.) The

limitation contained in the passenger ticket does not affect the plaintiff's right to recover. (*Perkins v. N. Y. C. R. R. Co.*, 24 N. Y. 196; *Blossom v. Dodd*, 43 N. Y. 264; *Mynard v. S., B. & N. R. R. Co.*, 71 N. Y. 180; *Rathbone v. N. Y. C. & H. R. R. R. Co.*, 140 N. Y. 48.)

BARTLETT, J. This action is brought to recover the value of a trunk and its contents destroyed while in the possession of the defendant, to which it had been delivered by the plaintiff's assignors for transportation from Rochester to New York on the evening of October 23d, 1897.

Curtis & Wheeler were manufacturers of shoes in the city of Rochester, and Joseph E. Taylor acted as their traveling salesman on the 23d day of October, 1897, and had been in their employ in that capacity for a period of nine years. On the evening in question, Taylor, acting for his employers, went from Rochester to New York on business; before starting he arranged with the baggageman of the defendant for the transportation of a trunk and an article called a "telescope;" the trunk and its contents, consisting of samples of shoes, belonged to Curtis & Wheeler, except a few articles of wearing apparel, the property of Taylor, for which no claim is made. The telescope contained the wearing apparel of Taylor.

For the trunk Taylor received from the baggageman a card known as "Excess Baggage Check," for which he paid eighty-five cents excess of baggage; for the telescope he received the ordinary metallic check. Taylor described the trunk, when a witness at the trial, as a regular sample trunk, made of wood and covered with canvas; about 32 or 34 inches in height, 36 to 38 inches in length and 22 to 24 inches in width.

The "number taker" of the Rochester baggageroom was sworn, and stated that he took a record of the baggage in and out; he produced a sheet containing a record covering October 23d, 1897, which showed the description of plaintiff's baggage as a sample trunk; he further testified that he so designated it from its appearance.

Taylor testified that he had been in the habit of leaving Rochester with his samples on an average of four, six or eight times a year for about twelve years. The night checkman was sworn for defendant and stated that he did know what the contents of the trunk were, and that nothing was said to him as to the contents. He was asked on cross-examination if he remembered anything about this particular trunk or its appearance; he answered, "I couldn't just now, no."

It is to be observed that this witness was not asked by defendant's counsel whether he recognized this piece of baggage as a sample trunk from its external appearance; he does not contradict the number taker as to the external appearance of the baggage showing it was a sample trunk.

The defendant does not question receiving the trunk, or the failure to deliver it, but insists it is not liable for its loss with contents, for the reason that Taylor when paying for excess of baggage on the trunk failed to inform the checkman that it contained samples.

The learned counsel for the defendant very frankly states in his brief that it is true the trunk was what is commonly known as a sample trunk and had the appearance of one, but, nevertheless, argues that the plaintiff should have been nonsuited.

The liability of common carriers for the loss of sample trunks carried by commercial travelers in the transaction of their business has been frequently considered by the courts of this and other jurisdictions during the last twenty-five years, and, while the decisions are conflicting, many of them are distinguishable in their facts from the case at bar.

The law relating to this subject has been in a state of evolution, and certain rules have finally been laid down in this state calculated to protect the rights of both parties, in view of the fact that a vast amount of the wholesale business of the country is transacted through commercial travelers to the great profit of the railroad companies and convenience of merchants.

As this case is in the position where each party is to be regarded as having requested the direction of a verdict (a

point we will discuss later), and the trial judge having directed a verdict for the plaintiff, all the controverted facts and all inferences in support of the judgment will be deemed conclusively established in his favor.

The defendant read in evidence certain rules of the company which provide in brief that baggage consists only of necessary wearing apparel limited to 150 pounds in weight; that sample baggage of not more than 150 pounds will be checked free for one person, regardless of the number or kind of tickets presented.

Rule 4 reads as follows: "Small cases or trunks containing merchandise will be carried as an accommodation to commercial travelers and may be checked when release of liability, Form 220, is signed in consideration of its transportation on passenger trains as baggage. In case personal baggage and samples are contained in same trunk, a release must be signed for samples, and agents will refuse to check the same unless this is done."

The release referred to absolves the company from all liability for loss, detention or damage to the trunk or its contents.

It is urged on behalf of the defendant that rule 4 limited the authority of the baggageman, and that he was unauthorized to check a sample trunk without exacting the release. This court has held that the baggage agent stands in the place of the railroad company (*Talcott v. Wabash R. R. Co.*, 159 N. Y. 471), and the record in the case before us shows that no release was exacted, nor was plaintiff's agent aware of the rule.

The plaintiff's agent testified that he had on a number of occasions signed this release when he desired to stop at several stations between Rochester and New York, as he could settle for excess of baggage through to New York for less than to pay this excess from each station at which he stopped.

On cross-examination he was asked: "Q. I ask you if you did not know the fact that when the baggagemaster knew that your trunk contained samples, or any other traveling man's

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trunk contained samples, that this release of liability was executed? A. No, sir; I had no knowledge of that. I knew that I had from time to time executed those releases on my sample baggage."

On re-direct examination he was asked: "Q. When you say that you had executed those releases, you refer to the releases which you described before, in order to save paying excess of baggage from each place when you departed? A. Yes, sir. No release was presented to me, nor did I sign any release, nor was I asked to, when I checked this trunk in controversy."

The defendant's checkman, or baggage master, does not deny this statement.

This case presents the question whether the baggageman of the defendant, who checked the lost trunk and collected excess of baggage thereon, knew that it was a commercial traveler's trunk from surrounding facts and circumstances, and that defendant was thus chargeable with notice.

This court has held that notice may be given to the common carrier by other means than the direct statement of the owner that he is a commercial traveler, and that his trunk contains samples.

In *Sloman v. Great Western Ry. Co.* (67 N. Y. 208) plaintiff's son, a lad of eighteen years of age, was employed by him as traveling agent to sell goods by sample. He had two large trunks containing the samples, different from ordinary traveling trunks, and had a valise for his personal baggage. He delivered the trunks to a baggage master at a railroad depot and when asked to which station he wished them checked, replied that he did not then know, as he had sent a dispatch to a customer at a certain place to know if he wanted any goods; if not, he desired them to go to a certain other place, where he expected to meet customers. Soon after he checked his baggage and paid two dollars for extra weight.

Judge RAPALLO, in his opinion, said: "It does not appear that it was stated, in terms, to the baggage master what the trunks contained, but the jury had the right to consider the

surrounding circumstances, the appearance of the passenger and of the articles, the conversation between the passenger and the baggage master, and the dealing between them, and if they indicated that the trunks were not ordinary baggage, or received or treated as such, the jury had the right to draw the inference of notice, and that they were received as freight."

In *Talcott v. Wabash R. R. Co.* (159 N. Y. 461) it appeared that when weighing the trunks the agent of the company observed "they weighed light," and the traveler replied, "Yes, they contain samples of underwear."

Judge VANN, referring to this incident, in the opinion of the court, at page 471, said: "The number and appearance of the trunks was some evidence that they contained merchandise, and the agent was expressly told that they contained samples. In view of the custom proved, that commercial travelers generally carry samples belonging to their employers in their trunks, this warranted the inference that the baggage agent knew the exact facts."

It the case at bar there were facts warranting the submission of the question to the jury, or the trial judge, as to whether defendant was charged with knowledge of the character of the trunk through its agent; the external appearance of a regular sample trunk; the readiness with which it was recognized, as such, by the official "number taker;" the fact that defendant was constantly checking sample trunks on all of its passenger trains except the Empire State Express; the further fact that for about twelve years plaintiff's agent had been traveling on defendant's road with a sample trunk and leaving Rochester six or eight times a year; the fact that sample trunks were checked for the same compensation as ordinary baggage — these and any other relevant facts were properly considered when the verdict was directed, and the facts warranted by the evidence stand conclusively established in favor of the plaintiff.

While it is doubtless the better practice, as suggested by defendant's counsel, that a traveler in charge of a sample trunk should state to the baggage agent the fact when he

seeks to check it, yet if in the haste of transacting such business, or where by many repetitions of the act, much is taken for granted, this is not done, it would be a harsh and unreasonable rule that precluded the plaintiff from submitting to the jury the facts surrounding the transaction.

The recovery in this case was not on the contract of passage entered into when the plaintiff's agent purchased his ticket, but on an independent agreement for the transportation of the sample trunk as freight.

In *Sloman v. Great Western Ry. Co.* (67 N. Y. at page 214), Judge RAPALLO said: "From all the circumstances, the jury were, we think, authorized to draw the inference that the baggage master understood that the agent was traveling for the purpose of selling goods, and that these trunks contained his wares; that he was not entitled to have them carried as his ordinary baggage and therefore the extra charge was made, and they were carried as freight." In *Talcott v. Wabash R. R. Co.* (159 N. Y. at page 470) this case was cited and followed.

The *Sloman* case also authorizes a recovery by a plaintiff where this independent contract is made by his salesman as agent. (p. 212.)

There remains to be considered one other question. The learned Appellate Division in its opinion stated, in substance, that as neither counsel raised the point that there were any questions of fact to be submitted to the jury, the effect was to establish the facts, if any there were, in favor of the plaintiff.

As the correctness of the practice at the trial is challenged, we will consider the question.

At the conclusion of the evidence the defendant's counsel moved for a nonsuit upon various grounds stated by him, which motion was denied. He then asked the court: "What question will your honor submit to the jury?" To this the court inquired: "What question do you desire to submit to the jury?" To which the defendant's counsel answered: "I do not desire to have any question submitted to the jury."

Thereupon the plaintiff's counsel stated that he was willing to leave it to the court, to which the defendant's counsel answered: "I stand on my motion for a nonsuit, of course." The plaintiff's counsel then asked for a direction of a verdict, which was objected to by the defendant's counsel, but was granted by the court. A verdict was directed and an exception taken by the defendant. Neither party asked to have any question of fact submitted to the jury.

In the case of *Adams v. Roscoe Lumber Co.* (159 N. Y. 176), O'BRIEN, J., in delivering the opinion of the court, says: "The court directed a verdict in favor of the plaintiffs for the value of the lumber, with damages for its detention, and the defendant excepted. The request by both parties for the direction of a verdict amounted to a submission of the whole case to the trial judge, and his decision upon the facts has the same effect as if the jury had found a verdict in the plaintiffs' favor after submitting the case to them. Under these circumstances the judgment is conclusive with respect to the two facts upon which the right of action depended." To the same effect is the case of *Smith v. Weston* (159 N. Y. 194); *Thompson v. Simpson* (128 N. Y. 270, 283), and *Koehler v. Adler* (78 N. Y. 287).

It is contended, however, that as the defendant asked for a nonsuit instead of a directed verdict, the foregoing cases have no application. It must be borne in mind that in this case, after the denial of his motion for a nonsuit, the defendant's counsel asked the court what question his honor would submit to the jury, and that the court then inquired of him what question he wanted submitted, and he answered that he did not desire any question submitted to the jury.

In the case of *Barnes v. Perine* (12 N. Y. 18), after the evidence had closed, the counsel for the defendant moved for a nonsuit. The motion was denied and the defendant excepted. The court thereupon, at the request of the plaintiff, directed a verdict in his favor. ALLEN, J., in delivering the opinion of the court, said: "If the defendant supposed that there was a disputed question of fact, material to the issue between the

parties, he should have made a distinct request that it should be submitted to the jury. But having treated the questions as purely legal, and acquiesced in the disposal of them by the court as such, he cannot now be heard to object that facts were involved which should have been decided by the jury."

In *Winchell v. Hicks* (18 N. Y. 558) the motion was also for a nonsuit at the conclusion of the evidence, which was denied and a verdict directed in favor of the plaintiff. In that case it was held that the defendant, moving at the conclusion of the evidence for a nonsuit, which is denied, if he desires that questions of fact be submitted to the jury, must distinctly request it and cannot upon appeal make the point under a general exception to the judge's direction of a verdict.

In the case of *O'Neill v. James* (43 N. Y. 84) there was a motion for a nonsuit, which was denied and the jury directed to find a verdict in favor of the plaintiff for the amount of the damages sustained. It was held that where a party, upon the trial, rests his case upon certain positions which he calls upon the court to rule in his favor as questions of law arising upon undisputed facts, if he also desires that any question of fact in the case be submitted to the jury, he must make a motion to that effect. In the absence of this his mere exception to the ruling of the judge that there is no question for the jury is unavailing. (See, also, *Ormes v. Dauchy*, 82 N. Y. 443; *Dillon v. Cockcroft*, 90 N. Y. 649.)

In the case of *Stone v. Flower* (47 N. Y. 566) the trial court directed the jury to find a verdict for the defendant. The plaintiff, however, had not waived his right to have the questions of fact involved in the case submitted to the jury by any motion on his part for such a direction; and it was held that he was entitled to have his exception, taken to the direction of a verdict, reviewed, but GROVER, J., in delivering the opinion of the court, refers with approval to *Barnes v. Perine*, *Winchell v. Hicks* and *O'Neill v. James*, above cited, and distinguishes the case under consideration by him from the rule adopted in those cases. In *Clemence v. City*

of *Auburn* (66 N. Y. 334), and in *Pratt v. D. H. M. F. Ins. Co.* (130 N. Y. 212), relied upon as supporting a different rule, there was no waiver by the appellant by motion to direct a verdict or for a nonsuit.

The cases cited of *Dwight v. Germania Life Ins. Co.* (103 N. Y. 341); *Bagley v. Bowe* (105 N. Y. 171); *Bulger v. Rosa* (119 N. Y. 459), have no application to the case at bar, as here the proceedings at the close of the trial were, in legal effect, a request by both counsel for a directed verdict.

The judgment and order appealed from should be affirmed, with costs.

O'BRIEN, J. (dissenting). This was an action by the assignee of a commercial firm for the loss of a trunk which was carried by the traveling salesman of the firm and was lost by the defendant. This trunk contained sample merchandise of the character in which the firm dealt, and was put upon one of the defendant's trains by direction of the salesman, who was a passenger from Rochester to New York, on the 23rd day of October, 1897. The salesman purchased a passage ticket on the defendant's road from Rochester to New York, which contained the following limitation: "In consideration of extended time within which journey may be begun, holder hereof releases R. R. Co. from all liability as to baggage, except for wearing apparel, not exceeding in value one hundred dollars." The salesman procured the trunk to be delivered at the railroad station and checked as baggage, paying eighty-five cents for excessive weight. By the defendant's rules a passenger is entitled to have carried free one hundred and fifty pounds of personal baggage, and by this rule baggage consists only of wearing apparel and such personal effects as may be necessary for the use and comfort of the passenger while traveling. Baggage in excess of that amount was to be paid for. The rule also provides that sample cases or trunks containing merchandise will be carried as an accommodation to commercial travelers and may be checked when a release from liability is signed in consideration of its trans-

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portation on passenger trains as baggage; and in case personal baggage and samples of merchandise are contained in the same trunk, a release must be signed for the samples, and agents are directed to refuse to check the same unless this is done. The baggagemen by this rule are directed to refuse to check baggage that does not consist strictly of personal effects unless this release is properly filled out and signed by the owner or the agent of the owner. The form of this release appears in this case, and by its terms the company is discharged from all liability for baggage whether the same arises from carelessness or negligence however gross on the part of the company, or its agents or servants, or from any cause whatever.

It appears that the salesman, who had the trunk in question, had on previous occasions signed these releases, though he stated that he never read them; but that there was no release signed on the occasion of the delivery of the trunk in question, nor did he make known to any of the servants of the company its contents, and there is no evidence in the case to show that the defendant, or any of its servants, on this or any other occasion knew the fact that the trunk carried by this salesman contained merchandise, except as that fact was to be inferred from its appearance.

It appears that the salesman had been in the employ of the firm for about twelve years, and during that time had been a passenger upon the defendant's road, but whether the trunk in question had ever been seen prior to the occasion in question by any of the defendant's agents or servants at Rochester does not appear. The claim for damages for the loss of the trunk was assigned by the firm to the plaintiff. These are the undisputed facts that appear in the record, and the question is whether the plaintiff was entitled to recover.

At the close of the proofs the defendant's counsel made a motion for a nonsuit on the ground, among others, that there was no evidence that the defendant had any knowledge that the trunk contained merchandise, and that there was no proof of a contract to carry a trunk containing merchandise on a passenger train, and that inasmuch as the trunk did not con-

tain baggage there could be no recovery. The motion was denied and the defendant excepted. The defendant's counsel then asked the court what question he proposed to submit to the jury. The court then asked the defendant's counsel what question *he* desired to submit to the jury, and the counsel replied that he did not desire to have any question submitted. The plaintiff's counsel then stated that he proposed to leave the case to the court, if the defendant's counsel was willing. The defendant's counsel did not accept this offer, but stated explicitly that he proposed to stand on his motion for a nonsuit. The plaintiff's counsel then asked the court to direct a verdict in his favor for the value of the trunk and contents, being five hundred and forty-two dollars and ten cents, and thirty-five dollars interest. The defendant's counsel objected to the direction of a verdict for the plaintiff, and made a special objection to the allowance of interest, but these objections were overruled. The court then directed a verdict in favor of the plaintiff for five hundred and seventy-seven dollars and ten cents, and to this direction the defendant's counsel excepted. The questions of law presented by the record are, therefore, before this court for review.

The plaintiff cannot recover in this case unless he established a contract, express or implied, on the part of the defendant to carry merchandise for the salesman on a passenger train. It is not and cannot be claimed that there was any express contract creating the relations of a common carrier of goods between the salesman and the defendant. The only express contract made is represented by the passenger ticket sold to the salesman, and that was a contract to carry him as a passenger, with his personal baggage. But it turned out that what he had in the trunk was goods, and not baggage, which, under the defendant's rules, it did not carry on passenger trains, except in cases where the owner or passenger signed a release for any claim for damages in case of loss from any cause whatever. So that the salesman caused the trunk in question to be placed on a passenger train without any express contract on the part of the defendant to carry or be responsible

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for it. Moreover, the defendant contends that the salesman caused the trunk to be placed upon the defendant's passenger train, against its rules, *as baggage*, when, in fact, it was not baggage, but goods.

There is but one ground upon which the defendant can lawfully be required to respond for the loss of the trunk and its contents, and that is in case it received and checked the same upon the train with knowledge of the fact that it contained goods instead of baggage. When a passenger who desires to have goods carried with him on a passenger train gives notice of that fact to the carrier, and the latter has notice of the fact in any way, and then receives and checks the trunk containing the goods, the relation of carrier and shipper is created by the transaction with all its duties and responsibilities. (*Slo-man v. Great Western Railway Co.*, 67 N. Y. 208; *Stoneman v. Erie Ry. Co.*, 52 N. Y. 429.)

But in the absence of proof showing, or tending to show, knowledge of the contents of the trunk or package by the carrier in such cases, there can be no recovery, and such knowledge cannot be inferred from the appearance of the trunk or package containing the goods. (*Humphreys v. Perry*, 148 U. S. 627; *Gurney v. Grand Trunk Ry. Co.*, 37 N. Y. S. R. 155; *affd.*, on opinion below, 138 N. Y. 638; *Cahill v. L. & N. Railway Co.*, 10 C. B. [N. S.] 154; *affd.*, 13 C. B. [N. S.] 818; *Blumantle v. Fitchburg R. R. Co.*, 127 Mass. 322; *Alling v. B. & A. R. R. Co.*, 126 Mass. 121.)

The case, therefore, is solved by a very simple inquiry, and that is, whether there is in the record anything showing, or tending to show, that the defendant had knowledge of the contents of the trunk in question when it received and checked it upon the train on the 23rd of October, 1897, other than the appearance of the same, which, it is held, is no evidence of knowledge at all. I confess I am unable to find any. It is said that the salesman was traveling, as such, for twelve years, but it does not appear that at any time he notified the defendant of the contents of the trunk, or that the defendant at any time acquired the knowledge in any other way, so that the

case stands upon the transaction when the trunk was shipped for the last time. A fact or circumstance that in itself proves nothing is not made any stronger when multiplied by twelve or any larger number. In my opinion there was no proof in the case to warrant a finding that the defendant had notice or any knowledge of the fact that the trunk in question contained goods instead of baggage.

But the learned trial judge evidently thought otherwise, and it distinctly appears from the opinion of the learned court below that reviewed the case on appeal, that it held that whether the defendant had or had not such notice or knowledge was a disputed question of fact. Grant, for the sake of the argument, that this view is correct, still, the disputed fact was not found by the jury and the action was one at law triable by jury. Either party had the constitutional right to have the facts determined by the jury. The learned court below held that the disputed fact necessary to support the plaintiff's case was found by the court without the aid of the jury, and that it had the right to take the question from the jury and decide it itself. This is an obvious error, since the doctrine upon which it is based would go far to destroy the right of trial by jury altogether. If sustained by this court, all that will be necessary hereafter when the plaintiff in an action at law has given proof of some fact or circumstance, which no one claims is conclusive in support of an issue of fact, is to request the trial judge to direct a verdict in his favor; and if such a direction is given against the defendant's objection and exception, still the disputed and necessary fact is to be deemed found by the court. The defendant could not be deprived of the right of a jury trial without its consent. It gave no such consent, nor did its counsel in any way waive the right. He moved for a nonsuit and excepted to the denial of his motion. He told the court that *he* had no question to submit to the jury, and obviously he had none from his view of the case, since he had just contended in his motion for a nonsuit that there was no case for the jury, as there was no proof that the defendant had knowledge of the contents of

the trunk. He told the court that he stood upon his motion for a nonsuit, and objected and excepted to the direction. How, under such circumstances, he consented to have the facts found by the court, or waived his rights to have them found by the jury, it is impossible to conceive. The defendant's counsel did not need any finding and did not want any finding. All he asked was that his client should be left alone. When his motion for a nonsuit was denied, and he concluded to stand upon that, he had no interest in anything else that took place. But it was quite different with the plaintiff. Before he could have judgment in his favor, it was necessary that the important fact in dispute should be found in his favor, and it was his business to procure the finding in the proper way. The defendant's counsel could remain silent and let the plaintiff try his side of the case. The plaintiff's counsel should then have gone to the jury and asked them to find the disputed fact, which was an essential part of his case, and which the other side was not interested in at all. When he asked and accepted the direction of a verdict in his favor by the court, he asked and accepted what he was not entitled to. The learned counsel for the plaintiff cites two cases to show that this practice is correct. (*Smith v. Weston*, 159 N. Y. 194; *Adams v. Roscoe Lumber Co.*, Id. 176.) They have no application to the question here, since it appears that they are cases where both sides asked the court to direct a verdict. All the parties may by such a request clothe the court with power to decide all the questions in the case, but it has never been held that *one* party could do it against the protest of the other. It is safe to say that no authority can be found to justify the practice followed in this case, and it has been often condemned in this court. The rule that governs the question has been thus stated in this court more than once: "In a case triable by a jury, the direction of a verdict is only justified where the evidence *conclusively* establishes the right of the party in whose favor it is made." (*Bulger v. Rosa*, 119 N. Y. 459; *Bagley v. Bowe*, 105 N. Y. 171; *Dwight v. Germania Life Ins. Co.*, 103 N. Y.

341.) It is not necessary for the party against whom a verdict is directed upon evidence not conclusive to show that he requested to have the case sent to the jury. (*Stone v. Flower*, 47 N. Y. 566; *Clemence v. City of Auburn*, 66 N. Y. 334; *Pratt v. D. H. M. F. Ins. Co.*, 130 N. Y. 212.) It would indeed be a rule of practice bordering on the absurd that would require a defendant in a case where a fact is in dispute, in order to preserve his right to have the fact found by the jury, to assert by such a request that there *is* evidence tending to prove the plaintiff's case, when upon a motion for a nonsuit just denied, he contended that there was *no* evidence whatever. He may preserve his rights by an exception to the direction of a verdict and without taking two positions before the court so manifestly inconsistent.

It is only necessary to add that if there is in this record any evidence at all of knowledge by the defendant of the contents of the trunk, no one ventures to assert that it was conclusive.

The judgment should be reversed and a new trial granted, costs to abide the event.

HAIGHT, MARTIN and VANN, JJ., concur, with BARTLETT, J., for affirmance.

PARKER, Ch. J., concurs with O'BRIEN, J., for reversal.

LONDON, J., dissents upon the ground that defendant, having, notwithstanding the denial of its motion for a nonsuit, objected to a direction of a verdict, the court should have submitted the facts to the jury.

Judgment and order affirmed.

TYNDALE PALMER, Appellant, v. GEORGE E. MATTHEWS et al., Respondents.

1. LIBEL — EVIDENCE — PUBLICATION BY OTHERS. In an action for libel, the fact, unknown to the defendant when the publication complained of was made, that others have published the same libel, or that suits have been commenced against others for the publication of such

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libel, is inadmissible in evidence: nor is it admissible because elicited on an improper cross-examination of plaintiff with reference to a letter written by him referring to the publication by others, which had been introduced by defendant as a part of a correspondence between plaintiff and defendant, and which correspondence had been previously introduced in part by plaintiff.

Palmer v. Matthews, 29 App. Div. 149, reversed.

(Argued January 30, 1900; decided February 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 12, 1898, affirming a judgment entered upon a verdict, and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Tyndale Palmer, appellant, in person. The court erred in admitting evidence that other newspapers had published the same libel against the plaintiff. It also erred in admitting evidence that plaintiff had commenced suits against other publishers for their publication of the libel. (*McCoy v. Crawford*, 1 Tappan [Ohio], 277; *Young v. Fox*, 26 App. Div. 261; *Palmer v. N. Y. N. P. Co.*, 31 App. Div. 210; *Gray v. B. U. P. Co.*, 35 App. Div. 286; *Witcher v. Jones*, 43 N. Y. S. R. 151; 137 N. Y. 599; *Van Ingen v. Mail & Express*, 35 N. Y. Supp. 838; *Morrison v. P. P. Co.*, 38 N. Y. S. R. 357; 133 N. Y. 538; *Buckley v. Knapp*, 48 Mo. 152; *Wilson v. Fitch*, 41 Cal. 363; *Sheahan v. Collins*, 20 Ill. 325.) The trial court erred in allowing defendants to prove in mitigation of damages that the libelous information had been received from another, and in refusing to charge, on plaintiff's request, that the mere fact that it had been received from another was no mitigation. (*T. P. Co. v. Carlisle*, 94 Fed. Rep. 762; *Conroy v. Times Co.*, 139 Penn. St. 334; *Hess v. N. Y. Press Co.*, 26 App. Div. 75; *Mapes v. Weeks*, 4 Wend. 659; *Foster v. Inman*, 8 Wend. 602; *Bush v. Prosser*, 11 N. Y. 347; *Hager v. Tibbets*, 2 Abb. Pr. [N. S.] 97; *Hatfield v.*

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Lasher, 81 N. Y. 246; *Sandford v. Bennett*, 24 N. Y. 20; *Folwell v. P. J. Co.*, 19 R. I. 551.) The court below erred in overruling the plaintiff's objection to the evidence of other publications of the libel on the ground that it was secondary. (*Barr v. Moore*, 87 Penn. St. 385; *State v. Lent*, 1 Tappan [Ohio], 115; *Vanderslice v. Newton*, 4 N. Y. 132; *Blumhart v. Rohr*, 17 Atl. Rep. 266; *Odgers on S. & L.* 292, 293; *Rose v. Graves*, 5 M. & G. 613; *Ingram v. Lawson*, 6 Bing. [N. C.] 216; *Ashley v. Harrison*, 1 Esp. 48; *Weiss v. Whittemore*, 28 Mich. 366; *Hartley v. Herring*, 8 T. R. 130; *T. Ins. Co. v. Perrine*, 3 Zab. [N. J.] 402.)

Charles B. Wheeler for respondents. The trial court did not err in permitting the defendants' counsel, on cross-examination, to question the plaintiff as to the number of other papers which had published the same article. (*Foster v. Tanenbaum*, 2 App. Div. 168; *People v. Casey*, 72 N. Y. 393; *People ex rel. v. O. & T. Co.*, 83 N. Y. 461; *Ryan v. People*, 79 N. Y. 600; *Starks v. People*, 5 Den. 108; *Newton v. Harris*, 6 N. Y. 345; *Day v. Stickney*, 14 Allen, 255; *Smith v. Shumway*, 102 Mass. 365.)

MARTIN, J. The action was for libel, and but two exceptions need be considered upon this appeal.

On the trial the defendants, under the objection and exception of the plaintiff, were permitted on the examination of the latter to prove that other newspapers throughout the country had published the libel complained of, and that he had commenced suits against others for their publication of it. This evidence was inadmissible. It is now too well settled to be questioned that the fact that others have published the same libel which was unknown to the defendant when the publication complained of was made, or that suits have been commenced against others for the publication of such libel, is inadmissible. The defendants in this case were liable, and that some one else was also liable was immaterial. It would not properly diminish the recovery against them to show that

the plaintiff had recovered or might recover damages from others who had published the same libel. Each defendant is to pay damages for the injuries which he has occasioned and not for the injury by others. (Odgers on Libel and Slander, p. 316; Newell on Defamation, etc., p. 899.) Therefore, this class of evidence is inadmissible.

While the defendant may, perhaps, show in mitigation of damages that he copied the libelous paragraph from a public newspaper, and, hence, believed it to be true, he may not show that other journals published the same statement simultaneously or subsequently to the publication complained of. Nor can he prove that the alleged libel appeared in another newspaper for which the plaintiff had already recovered damages. (Folkard's Starkie on Slander and Libel, p. 545.) That this evidence was inadmissible seems to be well established by the decisions in this state, as well as in other jurisdictions. (*Tillotson v. Cheetham*, 3 Johns. 56; *Palmer v. N. Y. News Pub. Co.*, 31 App. Div. 210; *Gray v. Brooklyn Union Pub. Co.*, 35 App. Div. 286; *Morrison v. Press Pub. Co.*, 38 N. Y. S. R. 357; *Mattice v. Wilcox*, 147 N. Y. 624; *Hatfield v. Lasher*, 81 N. Y. 246; *Smith v. Sun Printing & Pub. Assn.*, 55 Fed. Rep. 240, 245; *Enquirer Co. v. Johnston*, 72 Fed. Rep. 443; *Wilson v. Fitch*, 41 Cal. 363, 383; *Sheahan v. Collins*, 20 Ill. 325.)

The respondents now contend that this evidence was elicited by a proper cross-examination of the plaintiff, and, although it had the effect contended for by him, it was admissible on such an examination. We do not think so. On the trial the plaintiff introduced in evidence several letters which were a part of a correspondence between him and the defendants. The defendants then introduced another letter which was a part of the same correspondence, in which the plaintiff stated: "The financial loss to me from the publication as a whole was most serious. However, I do not expect any one paper to bear it all, but only its due proportion." This was the pretext of the defendants to justify the examination as to other papers having published the same libel, and as to the com-

mencement of suits against others. If it be assumed that the defendants had a right to introduce this letter in evidence as a part of the whole correspondence between the parties, still, it having been introduced by them, they could not properly cross-examine the plaintiff as to evidence so introduced, especially when its effect was to call out that which was utterly inadmissible and highly improper. Indeed, the examination which elicited this evidence was not a cross-examination at all. The proof thus obtained was procured from the plaintiff by compulsion. That this evidence was in no sense obtained by a proper cross-examination, is quite manifest. Therefore, the judgment cannot be upheld upon that ground.

The judgment should be reversed and a new trial granted, with costs to abide the event.

PARKER, Ch. J., GRAY, BARTLETT, VANN, CULLEN and WERNER, JJ., concur.

Judgment reversed, etc.

M. WOOLSEY BORLAND, as Sole Surviving Trustee of SARAH LLOYD COIT, under a Certain Trust Agreement, Appellant,
v. FRANCIS C. WELCH, as Executor of the Last Will and Testament of SARAH LLOYD COIT, Respondent.

1. ANTE-NUPTIAL SETTLEMENT — PROPERTY COVERED. Property coming to the wife after the husband's death is not subject to the trust created by an ante-nuptial settlement which purports to cover all property which she may "hereafter" acquire, notwithstanding that the wife is authorized to make appointment in favor of the issue of the contemplated marriage or of any "subsequent" one, and contains a covenant by the husband to settle under the trust any property which may accrue to the wife "during her lifetime."

2. COVENANT TO SETTLE SUBSEQUENTLY-ACQUIRED PROPERTY OF WIFE. A marriage covenant for the settlement of subsequently-acquired property upon trustees will, in the absence of any expression showing that it was intended to have a more extended operation, be so construed as to limit it to property acquired during the intended coverture, since its primary object is to prevent the property from falling under the sole control of the husband.

3. ANTE-NUPTIAL SETTLEMENT — ENFORCEMENT BY COLLATERALS OF WIFE. The provision in a marriage settlement that the property of the

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wife shall descend to her right heirs at law and next of kin in default of the exercise of a power of appointment reserved to her, is not, so far as concerns property acquired after the termination of her coverture, enforceable, by the trustee named in the settlement, for the benefit of collateral relatives of the wife, the latter having died without issue, but leaving a will disposing of the property, since her agreement is a voluntary executory agreement as to such property and was not made for the benefit of the collaterals who are volunteers.

Borland v. Welch, 88 App. Div. 284, affirmed.

(Argued January 28, 1900; decided February 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department entered March 25, 1899, reversing a judgment in favor of plaintiff entered upon the report of a referee, and dismissing the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

John L. Cadwalader for appellant. The provisions of the marriage settlement show an intention to subject to its provisions all the property of Sarah Lloyd Coit, in possession or after acquired, including any property acquired after the death of her husband. Even if the trust agreement is silent as to the disposition of the income of the trust property after Mr. Coit's death, Mrs. Coit would receive a resulting trust therein for life by implication of law. (Perry on Trusts, § 152; Hill on Trustees, 114, 118; Story's Eq. Juris. § 1119; Lewin on Trusts, 177; *Loring v. Eliot*, 16 Gray, 568.) The intent of the parties, as gathered from the language used in the marriage settlement, will govern its construction. (14 Am. & Eng. Ency. of Law, 551; *Stevens v. Van Voorst*, 17 Beav. 305; *Steenberger v. Potter*, 18 N. J. Eq. 452; *Hepburn's Appeal*, 65 Penn. St. 468; *Imlay v. Huntington*, 20 Conn. 166.) The provision in Mrs. Coit's marriage settlement that her after-acquired property should pass to her trustees is valid and will be enforced in equity against her executor. (*Kribbs v. Alford*, 120 N. Y. 519; *Mitchell v. Winslow*, 2 Story, 630; Pom. Eq. Juris. §§ 1236, 1287, 1288; *Barnard v. N., etc., R. R.*

Co., 2 Fed. Cas. 841; *Johnston v. Spicer*, 107 N. Y. 185; *Mundy v. Munson*, 40 Hun, 304; *Matter of Wilson*, 2 Barr, 325; *Tisdale v. Jones*, 38 Barb. 523; *Matter of Young*, 27 Hun, 54; *De Barante v. Gott*, 6 Barb. 492.)

Edward E. Sprague for respondent. A marriage settlement will not be deemed to include property acquired by the wife after the death of the husband, even though the instrument expressly purports to bind all property acquired after the marriage. (*Matter of Edwards*, L. R. [9 Ch. App.] 97; *Carter v. Carter*, L. R. [8 Eq. Cas.] 551; *Fisher v. Shirley*, L. R. [43 Ch. Div.] 290; *Matter of Coghlan*, L. R. [3 Ch. Div.] 76; *Alleyne v. Hussey*, 22 Wkly. Rep. 203; *Reid v. Kendrick*, 24 L. J. [Ch.] 503; *Howell v. Howell*, 4 L. J. [Ch.] 242; *Dickinson v. Dillwyr*, L. R. [8 Eq.] 546; *Hepburn's Appeal*, 65 Penn. St. 468; *Wilson's Estate*, 2 Barr, 325.) There is no reason for refusing to apply this rule of construction to the marriage settlement now before the court. (*Dickinson v. Dillwyr*, L. R. [8 Eq.] 546.) The application of a liberal rule of construction to an assignment of after-acquired property is justified by the legal invalidity of the assignment. (*Edgell v. Hart*, 9 N. Y. 213; *R. D. Co. v. Rasey*, 142 N. Y. 570; *Otis v. Sill*, 8 Barb. 102; *Smith v. Baylis*, 3 Dem. 567; *Kribbs v. Alford*, 120 N. Y. 519.) This is not a case in which equity will relieve against legal invalidity. (*Hendricks v. Isaacs*, 117 N. Y. 417.) A marriage settlement will not be deemed to apply to after-acquired property which has been bequeathed upon terms inconsistent with the trusts of the settlement. (*Matter of Mainwaring*, L. R. [2 Eq.] 487.)

CULLEN, J. In 1838 Sarah Lloyd Borland, in contemplation of her marriage with Henry Coit, which subsequently took place, entered into a deed or contract with him and certain trustees, in the nature of a marriage settlement. By this deed Miss Borland conveyed to the trustees all her estate, real and personal, derived or to be derived from the will of her grandfather, then deceased, and "which she may at any

time or times hereafter derive either by devise, descent, distribution, gift or otherwise howsoever, from any source or sources, person or persons whatsoever or whomsoever, other than the said party of the second part" (the husband), in trust, to apply the income to her sole and separate use during life, and in case of her husband surviving, then to pay him during life an annuity of \$2,000. The deed reserved to Miss Borland the power to appoint, by an instrument in the nature of a will, the remainder to the issue of the contemplated marriage, or of any subsequent marriage she might make. It then provided that in case of default in the exercise of the power of appointment the trust estate should descend to the right heirs at law and next of kin of Miss Borland, as in the case of intestacy under the laws of this state. Mr. Coit covenanted to execute any deed requisite to vest title of the trust property, or the estate which might come to Miss Borland under the will of her grandfather, "and so in like manner in regard to every acquisition of property which might come to the said party of the first part during her lifetime." Mr. Coit died in 1880. In 1896 Mrs. Coit received a legacy of twenty thousand dollars which she invested and retained until her death in 1898. The complaint does not allege that Mrs. Coit left any heirs at law or next of kin, nor is there any finding on that subject, but both counsel state in their briefs that there were no children of her marriage, and that her next of kin were brothers and sisters, or the children of deceased brothers and sisters. There is some evidence in the case as to who made up the Borland family at the time of Mrs. Coit's decease. This evidence accords with the statement of counsel, and we shall, therefore, assume that statement to be correct. Mrs. Coit left a will disposing of her property. This action was brought by the surviving trustee, under the trust deed against the executors of Mrs. Coit, to recover the securities representing the legacy received by her, and subject them to the terms of the trust deed.

A majority of the judges of the Appellate Division were of the opinion that by a proper construction of the ante-

nuptial settlement only such property as might come to the wife during coverture was subject to the trust deed. In that view we concur. The courts, deeming the primary object of the covenant to settle the subsequently-acquired property of the wife is to prevent its falling under the sole control of her husband, have long held that, in the absence of any expression showing it was intended to have a more extended operation, such covenant is to be construed as if the words "during said intended coverture" had been inserted. (*In re Edwards*, L. R. [9 Ch. App.] 97; *Howell v. Howell*, 4 L. J. Ch. 242; *Reid v. Kenrick*, 24 L. J. Ch. 503.) The decision in *Dickinson v. Dillwyn* (L. R. [8 Eq. Cas.] 546) is not in conflict with this rule, but expressly recognizes it. The legacy in that case, which was subjected to the settlement, accrued to the wife in reversion before the death of the husband. It was not a mere possibility.

The learned judge who wrote the dissenting opinion, while recognizing this rule of construction, thought that certain provisions of the marriage settlement showed that it was intended to include property acquired by the wife after the termination of her coverture. The first provision relied upon is that by which the wife is authorized to make appointment in favor of the issue of the contemplated marriage or of any subsequent one. The reference to a subsequent marriage doubtless shows that the trust was not to terminate by the death of the husband prior to that of the wife. We do not think it bears on the question of whether property acquired after the termination of the coverture should be subjected to the trust. Much stress is laid upon the covenant that the husband will settle under the trust any property which might accrue to the wife "during her lifetime." This provision, from one point of view, does tend to support the contention that all property acquired by the wife at any period of her life should be subjected to the trust; but, from another point of view, it has a contrary tendency. It is to be observed that the covenant is not that of the wife but of the husband. We do not intend to determine whether the wife, by joining in the deed, is bound

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by the husband's covenant. Apart from that question the fact that the covenant is the covenant of the husband would seem to contemplate a duration only during the time he might be such husband. This is the first ground upon which the decision in *In re Coghlan* (L. R. [3 Ch. Div. 1894] 76) proceeded. The ante-nuptial settlement there contained a covenant that if any moneys or personal estate should come to or devolve upon the wife during her life, then the said husband and his wife would settle such moneys or personal estate upon the trust prescribed in the deed. On account of the form of the covenant, it being that of the husband and wife, it was held to be operative only during coverture. That the courts have been entirely right in the view that the dominant object of the settlement of the wife's property by ante-nuptial agreement was to avoid the husband's marital rights given by the common law, and to save it from the claims of his creditors, is manifest from the fact that since the enactment of the married women's statutes such settlements have become, if not obsolete, extremely rare in this state. Considering the uniformity with which the rule mentioned has been adhered to by the courts, our attention having been called to but a single case in which the courts have subjected property of the wife acquired after coverture to trusts of an ante-nuptial agreement (*Stevens v. Van Voorst*, 17 Beav. 305, repudiated in *In re Edwards, supra*), we think the terms of the trust deed now before us do not manifest any such clear intention to the contrary as is requisite to take the case out of the general rule.

But, if it be assumed that we err in the construction of the trust deed the result would still be the same. So far as that deed was to operate on the subsequently-acquired property of the wife, it was an executory contract. To that contract the collateral relatives, in whose favor this action is brought, were not parties; they were strangers to the consideration, and the contract was not made for their benefit. The deed provided that if the contemplated marriage was not celebrated it should become void. The theory upon which equity enforces spe-

cific performance is that it is a "present contract, to give a lien, which, as between the parties, takes effect and attaches to the subject of it as soon as it comes into the ownership of the party." (*Kribbs v. Alford*, 120 N. Y. 519.) The marriage and the relinquishment by the husband of his marital rights over his wife's property doubtless constitute a sufficient consideration for the executory contract of the wife, so far as the husband and parties claiming through him are concerned. But as to collateral relatives of the wife, it is merely a voluntary executory agreement on her part. In the language of the cases, such relatives are volunteers.

In *Durnherr v. Rau* (135 N. Y. 219) it was held that to permit a third party to enforce a promise in a contract between others, the promisee must have a legal interest that the covenant be performed in favor of the party claiming performance.

In *Todd v. Weber* (95 N. Y. 181) it was held that the relation of parent and child was a sufficient consideration for a contract made by the parent with others for the support of the child, and that the latter might enforce it by action.

In *Buchanan v. Tilden* (158 N. Y. 109) it was held, though by a divided court, that a contract made by a husband with others, for the benefit of his wife, could be enforced by the wife, though not a party to the contract. This is the farthest the cases in this state have gone. It is, therefore, clear that no action at law could be maintained by collateral relatives on the wife's covenant in this case. In England, where marriage and other family settlements are common, equity has, at times, enforced executory contracts, where an action at law upon them could not have been maintained. In *Atherley on Marriage Settlements* (p. 125) the general rule is stated: "Equity will execute marriage articles at the instance of all persons who are within the influence of the marriage consideration, for all these rest their claims on the ground of a valuable consideration." But (p. 131) "courts of equity, generally speaking, will not enforce a specific performance of agreements, at the instance of volunteers. They make an exception, how-

ever, to this rule, in favor of a wife and children; and the reason for this exception is, that for them the settlor is under a natural and moral obligation to provide." Such persons alone are within the influence of the marriage consideration. So, in *Sutton v. Chetwynd* (3 Merivale, 248) it was held that a covenant in marriage articles in favor of a stranger was merely voluntary and ought not to be supported by the marriage consideration. In a note to section 486 of Pomeroy on Contracts it is stated that a covenant in a marriage settlement would, in England, be enforced in favor of collaterals, but the authorities cited do not support the statement in its full breadth. *Goring v. Nash* (3 Atkyns, 186) was the case of a marriage settlement, but to that settlement not only the husband and wife were parties, but the father of the husband. In consideration of the marriage, the father covenanted to settle the estate upon the son, upon certain limitations in favor of a daughter. The father having died, the daughter sought to enforce the provisions of the settlement in her favor. The relation of child and father thus subsisted between the complainant and the party from whom the consideration proceeded. *Pulvertoft v. Pulvertoft* (18 Vesey, 84) really decides nothing on the subject, though the chancellor says, *arguendo*, that a father, in settling property on his son, may require that the son should settle it on certain limitations in favor of the latter's brothers or uncles, for either might say to the other, "I will not agree unless you so settle." The hypothetical case suggested by the chancellor might resemble the present case if here the husband had required the wife to settle her property upon her death in favor of his next of kin and heirs at law. He had, however, no interest in the wife's next of kin or heirs at law, except in the case that they were his issue. In *Campbell v. Ingilby* (21 Beav. 567) the decision proceeded on the ground that the parties in whose favor the covenant of the marriage articles were sought to be enforced did not claim as persons in favor of whom the contract was made, and hence, volunteers; but as appointees by the wife and in her right. In that case, too, the attempt

was made to reach the husband's property and not the wife's. The same is true of *Johnston v. Spicer*, decided by this court. (107 N. Y. 185.) The parties claimed as successors in title to the wife, not directly as beneficiaries under the agreement. The American cases on this subject are few. In *Imlay v. Huntington* (20 Conn. 146) the provisions of the marriage settlement differed substantially from that now before us, and, therefore, involved questions that do not arise here. But the first ground on which the decision in the case proceeded was that the plaintiffs, collateral relatives of the wife, could not take advantage of the covenants of marriage settlement so as to enforce them while the agreement remained executory. Of this objection the learned court said: "We think it is entirely conclusive." Accordingly, it was held that the wife could relieve the husband from his agreement to settle subsequently-acquired property upon the trust prescribed in the marriage settlement. In *Gevers v. Wright's Executors* (18 N. J. Eq. 330) the trust deed conveyed all the wife's property, including any that she might subsequently acquire, in trust, to pay the income to her during coverture, and in case she survived her husband, to reconvey the trust estate to her; if she should die before her husband, then, in trust, for such persons as she might, by will, appoint; and if she died without appointment then, in trust, for the issue of the marriage. The parties had issue. Subsequently, the wife's father died, leaving to her a large personal property. The husband and wife sought to obtain this property from the executors of the father. The application was resisted by the guardian of the children of Mr. and Mrs. Gevers. It was held that "courts of equity will not aid and give validity to contracts or instruments which are of no effect at law, in favor of volunteers, but only when the contract or right sought to be enforced or established is founded on a valuable or meritorious consideration." It was further held that, as the trust property was to revert to the wife in case of her surviving the husband, or in case of her death before her husband was subject to her appointment, the issue could not be considered as within the

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Statement of case.

consideration of the agreement. The fund was ordered to be paid over to the wife. If, in this case, there were children of the marriage, we assume that under the terms of the antenuptial agreement they could insist that the subsequently-acquired property of the wife be subjected to the trust prescribed in that agreement, and thus there would accrue to the collateral relatives an interest in the property, contingent on the death of all the issue prior to the death of the wife, for a covenant must be enforced in its entirety, if at all. (*Davenport v. Bishop*, 19 Eng. Ch. Rep. 698.) But we have found no case where the execution of such an agreement has been compelled at the instance of collaterals, whose remote or possible benefit was no part of the object of the marriage settlement. In our judgment the equities of the wife and her legatees are greater than the equity of those claiming under the settlement as volunteers.

The judgment and order appealed from should be affirmed, with costs.

PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN and WERNER, JJ., concur.

Judgment and order affirmed.

CITIZENS' NATIONAL BANK OF CORRY, PA., Appellant, v.
ABIJAH WESTON, Respondent, Impleaded with Others.

1. PROMISSORY NOTE — BURDEN OF PROOF. Proof that a promissory note was fraudulent as between the payee and makers shifts to a transferee, suing thereon, the burden of proof, and it becomes necessary for him to show not only the payment of value by him, but the circumstances under which he became the holder of the note.

2. TRIAL — INSTRUCTION AS TO BONA FIDES. In an action against the members of a partnership as makers, by the transferee, of a promissory note, an instruction that the jury might consider, as bearing upon the question of plaintiff's status as a *bona fide* holder, the fact that none of its officers or agents took the stand after the burden of proof had been shifted to it by defendant's proof that the note was fraudulent as between the makers and the payee, *held*, in view of the state of the record when defendants rested, not to constitute reversible error.

3. INSTRUCTION AS TO BONA FIDES. It is not prejudicial error for the court in such an action, to instruct the jury that in passing upon the question whether plaintiff knew at the time it discounted, for the payee, the note in suit, which was not on interest, that it had been given for the payee's accommodation, they may consider the fact that it had already run one year and seven months before that time and was due in a month thereafter.

4. PARTNERSHIP — NOTICE OF DISSOLUTION. It is reversible error for the court in such an action to instruct the jury, in substance, that the plaintiff, in law, had been notified of the dissolution of the defendant firm where it appears that notice thereof had been communicated to two commercial agencies, that one or two newspapers in the vicinity had published a local item of the dissolution and that printed notices thereof had been sent out by the firm's corporate successor in its business letters; these facts are insufficient to charge the plaintiff, assumed to be a non-dealer with the firm, and thus only entitled to general notice, with notice of its dissolution, since to make a general notice legally effectual the only safe rule is that it be seasonably published in one or more of the newspapers in the immediate vicinity.

5. INSTRUCTION — STATEMENT CONTRARY TO EVIDENCE. It is prejudicial error for the court to charge in such an action that so far as the payee's evidence shows, the plaintiff made no inquiry with reference to the makers or their financial standing except, "he says, they consulted a commercial report," where, during the payee's examination, a letter from the cashier of another bank to the vice-president of plaintiff was introduced, in which the writer stated that the paper of the makers held by the payee was good beyond question, and it was proved that the makers were rated in one commercial report as worth over a million dollars, notwithstanding that the statement had reference to the first considerable discount of the makers' paper made by plaintiff and that the court read the letter to the jury.

Citizens' Nat. Bank v. Weston, 19 App. Div. 627, reversed.

(Argued January 31, 1900; decided February 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 21, 1897, affirming a judgment in favor of defendants entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

Alex. Wentworth for appellant. The uncontroverted evidence showed that the plaintiff discounted the note in suit and became the owner thereof in good faith, in the usual course of business before maturity for full value, and without

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Points of counsel.

notice of any facts affecting its validity. (*C. Nat. Bank v. Diefendorf*, 123 N. Y. 191; *Hopkins v. Clark*, 158 N. Y. 299.) The plaintiff had no actual knowledge or notice of any defect in the paper or of the relations of the several parties to the paper other than what appeared upon the face of the note itself. There are absolutely no circumstances sufficient to enable the jury to find want of honesty or good faith on the part of the plaintiff in discounting the note in suit. (*Cheever v. P., etc., R. R. Co.*, 150 N. Y. 59.) The charge of the court was clearly erroneous and misled the jury. The clear undisputed facts attending the discounting of the first note in August, 1891, show the utmost caution and good faith on the part of the plaintiff, and there is no evidence whatever which, as a matter of law, authorized the jury to come to any other conclusion. (*Cheever v. P., etc., R. R. Co.*, 150 N. Y. 59; *A. S. Bank v. Savery*, 82 N. Y. 291; *A. E. Nat. Bank v. N. Y. B., etc., Co.*, 148 N. Y. 698.)

J. H. Waring for respondent. The evidence shows that the note in suit was made and issued without consideration by William W. Weston for Ramsey's accommodation more than eighteen months after Weston Brothers firm had been dissolved, and without the knowledge, consent or authority of the defendant's testator, and as to him it was fraudulently and illegally made and put in circulation. (*Smith v. Weston*, 81 Hun, 87; *Gansvoort v. Williams*, 14 Wend. 133; *Foote v. Sabin*, 19 Johns. 154; *Smith v. Weston*, 159 N. Y. 194, 198; *Vosburg v. Diefendorf*, 119 N. Y. 357; *C. N. Bank v. Diefendorf*, 123 N. Y. 191; *F. N. Bank v. Green*, 43 N. Y. 298; *O. N. Bank v. Curll*, 55 N. Y. 440; *Nickerson v. Ruger*, 76 N. Y. 279.) There was no error in the charge to the jury. (*People v. Featherly*, 131 N. Y. 597, 598; *Newell v. Bartlett*, 114 N. Y. 399, 405; *Standard Oil Co. v. Amazon Ins. Co.*, 79 N. Y. 506, 508; *Vosburg v. Diefendorf*, 119 N. Y. 357; *C. Nat. Bank v. Diefendorf*, 119 N. Y. 357; *Jewell v. Wright*, 30 N. Y. 259.) In the collection of the notes as the plaintiff's agent, Eaton must have known

that Ramsey made the payment; it was his duty to communicate that information to the plaintiff, and the law presumes that he did, and charges the plaintiff with knowledge of anything that he learned while acting for it and in its business. (*Bank of U. S. v. Davis*, 2 Hill, 451; *Sutton v. Dillaye*, 3 Barb. 529; *Constant v. University*, 111 N. Y. 604.) The discounting of one note or one of a series of notes made for Ramsey's accommodation in the name of Weston Brothers before the dissolution and without the knowledge or authority of the respondent's testator, did not make the plaintiff a previous dealer so as to entitle it to actual notice. (*City Bank v. McChesney*, 20 N. Y. 240; *Whitman v. Leonard*, 20 Mass. 177; Story on Part. § 334; *Ketcham v. Clark*, 6 Johns. 144; *Bristol v. Sprague*, 8 Wend. 423; *Vernon v. Manhattan Co.*, 22 Wend. 183; *Wardwell v. Haight*, 2 Barb. 549; *Lovejoy v. Spafford*, 93 U. S. 430.)

BARTLETT, J. This is an action upon a promissory note for \$3,129.77, dated Olean, N. Y., Dec. 6th, 1891, due Aug. 13th, 1893, payable to the order of G. E. Ramsey at the First National Bank of Olean, and made by the firm of Weston Brothers.

This firm was composed of defendants Abijah Weston, Orrin Weston and William W. Weston. Abijah and Orrin alone defended, and the latter has died pending the action.

The note was indorsed by G. E. Ramsey and others when the plaintiff discounted it for the payee.

The plaintiff is a national bank doing business at Corry, in the state of Pennsylvania, which is located about one hundred miles from Olean.

Weston Brothers were lumber dealers doing business at Weston's Mills, about three miles from Olean; the firm, organized in 1852 or 1853, was very prosperous, and dissolved January 5th, 1892. William W. Weston was the resident partner; Orrin lived part of the time at Weston's Mills and later at North Tonawanda; Abijah resided at Painted Post in this state, one hundred miles from Olean.

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The answer, in substance, denies the execution of the note; pleads the dissolution of the firm before the note was executed; alleges that the defendant William W. Weston fraudulently affixed the name of Weston Brothers to the note without any consideration and delivered it to Ramsey, the payee, for his accommodation; that the note was fraudulently antedated, and not used in the business of the firm.

This court has had occasion recently to decide several cases involving the alleged fraudulent use of the name of Weston Brothers, either as makers or indorsers of paper issued by William W. Weston. (*Smith v. Weston*, 159 N. Y. 194; *Bank of Monongahela Valley v. Weston*, 159 N. Y. 201; *Second Natl. Bank of Elmira v. Weston*, 161 N. Y. 520.)

The main question litigated at the trial was whether the plaintiff bank is the *bona fide* holder of the note in suit.

A verdict for the defendants and the unanimous decision of the Appellate Division affirming the judgment entered thereon, leave the plaintiff with all the necessary facts to support the verdict, warranted by the evidence, found in favor of the defendants and not reviewable in this court.

The learned counsel for the plaintiff seeks to secure a reversal of the judgment on the ground that the charge of the trial judge to the jury was misleading and involved manifold legal errors, to the great prejudice of plaintiff's rights.

On the trial the plaintiff made the usual *prima facie* case and rested.

The defendants put on the stand G. E. Ramsey, the payee of the note, and proved by him that the note in suit, although dated December 6th, 1891, was not drawn and signed until July 10th, 1893. He also testified that the note was made in his business; that it was understood between him and William W. Weston that witness was to pay it; that he asked William W. Weston to put the firm name on the note; that he secured William W. Weston for this and other paper of a similar character by a conveyance of real estate, which fact he imparted to the officers of the plaintiff.

Abijah Weston was sworn, and referring to the note in suit

and five others which had been discounted by plaintiff for Ramsey, testified as follows: "I do not know anything about any of these notes that have been spoken of as discounted by the plaintiff's bank; I first heard of them when I was sued; I did not know of them, or any of them, at the time they were executed; I never was consulted in reference to giving them; I never consented in any way to giving them; I knew nothing of the deed executed by Ramsey to William W. Weston; I never was consulted in any way in reference to that transaction; I never consented to it in any way; I never heard of it until this action was begun."

It is upon this clear and uncontradicted evidence that the jury will be presumed to have found, among other things, that this note in suit was fraudulent as between Ramsey, the payee, and the firm of Weston Brothers.

The effect of this evidence was to shift the burden of proof, and it became necessary for the plaintiff to show not only the payment of value, but under what circumstances it became the holder of the note. (*First Natl. Bank v. Green*, 43 N. Y. 298; *Vosburgh v. Diefendorf*, 119 N. Y. 357; *The Canajoharie Natl. Bank v. Diefendorf*, 123 N. Y. 191, 201, 202; *Joy v. Diefendorf*, 130 N. Y. 6, 9; *Smith v. Weston*, 159 N. Y. 194, 198, 199.)

The plaintiff, after defendants rested, gave no evidence, and the jury must have found, among other facts, that it was not the *bona fide* holder of the note.

We have referred to this evidence, and the shifting of the burden of proof, as having a bearing on the first point in the judge's charge to the jury, which we shall consider.

The plaintiff insists that it was error for the court to charge that, in view of the burden of proof having shifted to the plaintiff, the jury might consider, as bearing upon the question of *bona fide* holder, the fact that none of the officers or agents of the plaintiff took the witness stand. In view of the state of the record when defendants rested, we are not prepared to say that this portion of the charge discloses legal error. .

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Another alleged error is where the court, calling the attention of the jury to the fact that the note in suit had run one year and seven months before discount, and was due in a month thereafter, told them they could consider this in determining the question of fact.

It appeared the note was not on interest, and the jury were entitled to consider all the facts growing out of the discount as possibly bearing on the question whether plaintiff knew that it was paper issued to the payee for his accommodation. There was no prejudicial error in this part of the charge.

The next exception to the charge presents a serious question.

The judge stated to the jury that Abijah Weston must show the note was fraudulently issued, and he then dwelt in detail upon the facts showing the dissolution of the firm of Weston Brothers before the note was made; the notices given of the dissolution to former dealers with the firm and the general public. He pointed out that the fact of dissolution was communicated to two commercial agencies — Dun's and Bradstreet's — and that one or more local newspapers announced the fact that the firm was dissolved. The judge then charged: "So you see, gentlemen, from the evidence, if you believe the evidence given upon that subject, that the dissolution of this copartnership was quite generally known, and as is ordinarily done and required in the dissolution of a copartnership. The law does not require upon a copartnership being dissolved notice shall be published in the press. The law simply requires that in order to relieve the copartnership from future liability that notice shall be given to those with whom they have dealt, and in such a general way as will be likely to reach those who would be otherwise apt to continue credit upon the strength of the copartnership." The judge then pointed out that there was no direct evidence that any notice of the dissolution had been given the plaintiff.

We shall assume for present purposes, without deciding the point, that the plaintiff was not a dealer with the firm of Weston Brothers, and thus only entitled to general notice of its dissolution. The trial judge was in error in laying down the

law as to general notice and in stating to the jury under the facts of this case that the dissolution "was made quite generally known and as is ordinarily done and required."

This court in *Bank of Monongahela Valley v. Weston* (159 N. Y. 201, 211) held as to non-dealers that the notice to the two prominent commercial agencies was insufficient.

The added facts in this case that one or two newspapers in the vicinity published a local item of the dissolution, and that printed notices thereof were sent out by the firm's corporate successor in its business letters do not distinguish it from the case last cited.

The great weight of authority in this state is to the effect that the only safe rule, in order to make the general notice of dissolution legally effectual, is to seasonably publish it in one or more of the newspapers in the immediate vicinity. (*Lansing v. Gaine*, 2 Johns. 300; *Ketcham v. Clark*, 6 Johns. 144; *Graves v. Merry*, 6 Cow. 701, 705; 2 Bates on Part. § 618; *City Bank of Brooklyn v. McChesney*, 20 N. Y. 240; *Austin v. Holland*, 69 N. Y. 571; *Natl. Shoe & Leather Bank v. Herz*, 89 N. Y. 629; *Elmira Iron & Steel Rolling Mill Company v. Harris*, 124 N. Y. 280; 159 N. Y. 201.)

The jury were in substance told that the plaintiff, in law, had been notified of the dissolution of the firm.

There is nothing in the record to warrant this statement; and as the point is most material, we think the charge presents reversible error.

It is further urged that it was error for the court to charge as follows: "So far as Ramsey's evidence shows there was no inquiry made with reference to who those Westons were, or where their place of business was, or what their business was, or where they could be found in case this note was not paid at maturity, or what property they were worth, other than he says they consulted a commercial report."

When Ramsey was giving his evidence the letter of August 19th, 1891, from the cashier of the First National Bank of Olean to the vice-president of the plaintiff was produced, in which the writer stated that the paper Ramsey had, made by

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Weston Brothers, was "a No. 1, gilt edge, in fact good beyond question."

The portion of the charge quoted has reference to the first considerable discount of Weston Brothers' paper made by the plaintiff. It is true that the court read this letter to the jury, but it is impossible to say the charge did not tend to divert the minds of the jurors from the force of this letter as an indorsement of Weston Brothers' paper and their general credit, as well as to belittle the effect of plaintiff's officers having consulted a commercial report. It was proved that Weston Brothers in one commercial report were rated as worth over a million dollars.

The jury may have given undue weight to this utterance of the judge.

We think it was prejudicial to the plaintiff.

There are a number of other exceptions to the charge, but we will not consider them in detail, having reached the conclusion there must be a new trial.

We have been much impressed, in reading this lengthy charge of the court to the jury, with the fact that in its general trend it bore heavily against the plaintiff.

The learned and upright judge who delivered it of course did not intend any such effect, but the result was inevitable not only by reason of the errors pointed out, but by calling the attention of the jury to many circumstances, trivial in themselves, that did not tend to establish the bad faith of the plaintiff.

The judgment appealed from should be reversed and a new trial ordered, with costs to abide the event.

PARKER, Ch. J., GRAY, MARTIN, VANN, CULLEN and WERNER, JJ., concur.

Judgment reversed, etc.

THE TRUSTEES OF THE FREEHOLDERS AND COMMONALTY OF THE
TOWN OF SOUTHAMPTON, Respondents, v. NATHAN C. JESSUP,
Appellant, et al.

1. TOWN OF SOUTHAMPTON — RIGHT TO MAKE A ROADWAY ACROSS GREAT SOUTH BAY IS A FRANCHISE. The right, created by a resolution of the trustees of the town of Southampton, vested by royal charters granted in colonial days, with title and sovereignty over the waters of Great South Bay, in that town, and the lands thereunder, authorizing a riparian proprietor "to make a roadway and to erect a bridge" across the bay, the said bridge to be a drawbridge, and providing that there shall be no unnecessary delay to those navigating the waters of the bay, is a franchise, as distinguished from a license or an easement.

2. CHARACTER OF ROADWAY AUTHORIZED BY GRANT. Any reasonable and ordinary roadway, such as a solid embankment of earth, is authorized by such a resolution, as a roadway to be made over lands under water includes more than a mere right of way, and of necessity contemplates a structure resting on the land and extending above the water, and, in the absence of specifications in the grant, confers upon the grantee of the franchise the right to make it out of the materials in common use for the construction of roads, such as earth and stone.

3. ERECTION OF TEMPORARY STRUCTURE. The grantee of the franchise under such resolution waives no right by building a temporary structure in the first instance.

Trustees of Southampton v. Jessup, 10 App. Div. 456, reversed.

(Argued February 1, 1900; decided February 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 10, 1896, affirming a judgment in favor of plaintiffs entered upon a decision of the court after a trial at Special Term.

This action was brought to enjoin the defendant from excavating, embanking or otherwise interfering with lands under the waters of Great South Bay at Potunk Point, in the town of Southampton, county of Suffolk, and to recover damages for alleged trespasses of like character already committed. The answer justified the acts of the defendant under authority from the secretary of war and under a resolution duly adopted by the plaintiffs on the 2d of June, 1888, of which the following is a copy:

N. Y. Rep.]

Statement of case.

"*Resolved*, that Nathan C. Jessup be and is hereby given liberty to make a roadway and to erect a bridge across the Great South Bay, commencing at the south point of Potunk Neck, thence running southerly to the beach, the said bridge to be a drawbridge, of a width of not less than twenty feet, the height above the meadow three feet, and the draw to be twenty feet wide, and the said Nathan C. Jessup shall not cause any unnecessary delay to those navigating the waters of said bay."

The defendant further alleged that he had erected the bridge authorized by said resolution; had permanently built a portion of the roadway, at great expense, and for the rest of the distance had erected a temporary structure on piles, intending to replace it by a permanent and substantial roadway, and that he had been delayed in completing it by an injunction but recently vacated.

Upon the trial it appeared that the width of the bay at the locality in question is about 350 feet, and that when this action was commenced, the defendant, for a distance of more than 200 feet from the south shore nearly to the bridge, had constructed a solid roadway thirty feet wide and three feet high, by excavating the earth from the bottom on either side and throwing it into the middle. There is no tide at this point and the water is very shoal, varying in depth from six inches to a foot and one-half. When the wind blows from the west the water is forced eastward, where the bay is half a mile wide, and sometimes floods the highways and the cellars of the houses on the uplands. It was claimed by the plaintiff that a solid roadway would obstruct the reflow of the water to its accustomed level, but that the wooden structure on piles would have no such effect. It was claimed by the defendant that a solid roadway would necessarily obstruct the flow of water one way as much as the other, and hence would prevent the water from flowing eastward to a great extent and thus save the uplands from inundation.

The trial judge, by a decision which did not separately state the facts found, directed judgment for an injunction and for

the sum of \$450 damages, stating as the grounds that "the resolution of the board of trustees of the town of Southampton, set forth in the answer and proven upon the trial, did not authorize or permit the defendant to construct a solid embankment or roadway across said lands; that it was the intention of the said trustees and of the defendant that there should be constructed a roadway, built of timber upon piles driven into the mud and water; that such resolution was so construed and acted upon by the parties, and the acts of the defendant complained of were without authority, and consequently constituted a trespass." Judgment was entered accordingly, and after affirmance by the Appellate Division the defendant appealed to this court.

David B. Hill and *Charles M. Stafford* for appellant. The resolution in question conferred a franchise or easement and not a mere license. (*Baldwin v. Taylor*, 166 Penn. St. 507; *Mumford v. Whitney*, 15 Wend. 381; *Sweeney v. St. John*, 28 Hun, 638; *Babcock v. Utter*, 1 Keyes, 417; *Mendenhall v. Klinck*, 51 N. Y. 246; 8 Am. & Eng. Ency. of Law, 585; 2 Washb. on Real Prop. 19, 25; 3 Kent's Com. [12th ed.] 458; *Langdon v. Mayor, etc.*, 93 N. Y. 130; *Milbau v. Sharp*, 27 N. Y. 611; *G. L. & P. J. R. R. Co. v. N. Y. & G. L. R. R. Co.*, 134 N. Y. 439; *T. & T. T. R. Co. v. Campbell*, 44 Cal. 89.) The authority to make the roadway and erect the bridge carries with it, necessarily, a right of ingress and egress, a right of way to and over the roadway and bridge. (*Green v. Putnam*, 8 Cush. 29; *Hooper v. Farnsworth*, 128 Mass. 487; *Oliver v. Dickinson*, 100 Mass. 114; *Langdon v. Mayor, etc.*, 93 N. Y. 129; *Voorhees v. Burchard*, 55 N. Y. 98; *Huttemeier v. Albro*, 18 N. Y. 48; *Richardson v. Bigelow*, 15 Gray, 154; *C. R. Bridge v. Warren Bridge*, 7 Pick. 462; *Winchester v. Osborne*, 62 Barb. 342; *Doyle v. Lord*, 64 N. Y. 432; *Huntington v. Asher*, 96 N. Y. 613.) The resolution was sufficient to authorize the appellant to make a solid roadway, as well as to erect a bridge, and to dig in the lands under water and use that land in the making of such roadway,

and the erection at the outset of a temporary structure did not affect this right. (*Selden v. D. & H. C. Co.*, 29 N. Y. 640; *Adams v. Emerson*, 6 Pick. 57; *Tucker v. Tower*, 9 Pick. 108; *Huntington v. Asher*, 96 N. Y. 605, 613; *R. P. Co. v. Westcott*, 28 Am. St. Rep. 249.) Even if the resolution should be regarded as conferring a license and not a franchise, still, as it contemplated expensive improvements of a permanent nature, and the defendant having expended a large sum of money in the construction of such improvements and in reliance upon such resolution, it must be regarded under such circumstances as irrevocable. (*Vannest v. Fleming*, 18 Am. St. Rep. 387; *Flickinger v. Shano*, 87 Cal. 126; *Grimshaw v. Belcher*, 22 Am. St. Rep. 298; *Clark v. Glidden*, 60 Vt. 702; *Wickersham v. Orr*, 9 Iowa, 253; *Rhodes v. Otis*, 33 Ala. 578; *Huff v. McCawley*, 53 Penn. St. 206; *McBroom v. Thompson*, 25 Ore. 559; *G. L. & P. J. R. R. Co. v. N. Y. & G. L. R. R. Co.*, 134 N. Y. 435.) A license, even if revocable, is effectual to justify everything which may be done under it prior to its revocation; and no damages are recoverable on account of such acts. (*Selden v. D. & H. C. Co.*, 29 N. Y. 634; *Miller v. A. & S. R. R. Co.*, 6 Hill, 61; *Pratt v. Ogden*, 34 N. Y. 20; *Pierrepont v. Barnard*, 6 N. Y. 279; *Syron v. Blake-man*, 22 Barb. 336; *Walter v. Post*, 6 Duer, 363.)

Thomas Young for respondents. The resolution does not authorize the construction of a solid embankment. The permission granted by it was exhausted by the first roadway the defendant built. (*Cowles v. Kidder*, 24 N. H. 364; *Carleton v. Redington*, 21 N. H. 291, 293.)

VANN, J. The roadway in question is one of the approaches to the same bridge that was recently the subject of controversy in this court, and was built under the authority of the resolution then under consideration. (*People ex rel. Howell v. Jessup*, 160 N. Y. 249.) We held in that case that the plaintiffs in this action, through the Andros and Dongan charters, became vested with "a title and sovereignty over the waters,

and the lands thereunder, at and opposite Potunk Point, that enabled them to permit the doing of all things that a government may do for the benefit of its people," and that they had power to adopt said resolution.

Neither party challenges that decision, but both recognize it as sound law, so that no question now arises as to the power of the plaintiffs in the premises. They differ, however, as to the meaning and effect of the resolution, the plaintiffs claiming that it is a mere license, revocable at will, while the defendant insists that it is a franchise or easement, or, if a license, irrevocable after he had acted upon it at a large expense.

A license is a personal, revocable and non-assignable privilege, given by writing or parol to one, without interest in the lands of another, to do one or more acts of a temporary nature upon such lands. (*Greenwood Lake, etc., R. R. Co. v. N. Y. & Greenwood Lake R. R. Co.*, 134 N. Y. 435, 440, and cases cited.) "Although originally revocable at the will of the licensor, it may become irrevocable through the expenditure of money by the licensee." (Id.)

An easement is a permanent right conferred by grant or prescription, authorizing one landowner to do or maintain something on the adjoining land of another, which, although a benefit to the land of the former and a burden upon the land of the latter, is not inconsistent with general ownership. (*Long Island R. R. Co. v. Garvey*, 159 N. Y. 334, 338, and cases cited.)

A franchise is a grant by or under the authority of government, conferring a special and usually a permanent right to do an act, or a series of acts, of public concern, and, when accepted, it becomes a contract and is irrevocable, unless the right to revoke is expressly reserved. (*People ex rel. Atty.-Genl. v. Utica Ins. Co.*, 15 Johns. 357, 387; *Bank of Augusta v. Earle*, 13 Pet. 519, 595; *California v. Pacific R. R. Co.*, 127 U. S. 1, 40.) These definitions, while not comprehensive enough to cover all cases, are sufficient for the case in hand.

The right in question is not a license, because it is neither

temporary nor personal, as the drawbridge and roadway authorized are substantial, fixed and permanent improvements, for the benefit of defendant's lands, and assignable therewith. It would fall under the definition of an easement if it had been granted by an ordinary landowner and not by a body holding lands under water in trust for the public. We think it is a franchise, because it was granted in the exercise of a governmental power conferred by royal charter in colonial days. (*People ex rel. Howell v. Jessup, supra.*) It is a special privilege, because it is not of common right; is permanent, because there is no limitation as to time, and is of public concern, because it relates to the public domain. A roadway necessarily includes a right of way, which, when granted by a legislative body, is a franchise. The resolution has the same effect as if a like privilege had been granted by act of the legislature in relation to similar lands held by the state for public use. A grant by the resolution of a legislative body is as effective as a grant by deed of an executive body and is the usual form in which franchises are conferred.

In construing this franchise we are not to lose sight of the principle that a grant from the public, so far as it is ambiguous, is to be construed in the interest of the public, and hence in favor of the grantor, and not, as in ordinary cases, in favor of the grantee. (*Syracuse Water Co. v. City of Syracuse*, 116 N. Y. 167, 178; *Mayor v. Starin*, 106 N. Y. 1, 19; *Wells v. Garbutt*, 132 N. Y. 430, 435.) This principle, however, is to be applied only when doubt arises, for when the meaning is clear there is no room for construction. While the resolution specified the kind, and to some extent the dimensions of the bridge, as well as its height above the meadow, it did not specify the kind of material out of which it was to be made. The roadway is not described except as to its length, but the resolution, as well as the attending circumstances, show that it was to be built out of some kind of material. The defendant was not to erect a bridge and roadway, but to make a roadway and erect a bridge. The latter had to be an elevated structure in order to pass over the channel and not

obstruct navigation, while the former could be a solid bank of earth. A roadway to be made over lands under water includes more than a mere right of way, for of necessity it contemplates a structure resting on the land and extending above the water. In the absence of specifications in the grant, the defendant had the right to make a roadway out of the materials in common use for the construction of roads, such as earth and stone. Wood is not ordinarily used for the purpose, and the right conferred was not to build a viaduct, but make a roadway, which is generally solid from the ground up. If the plaintiffs wished to limit the defendant to a wooden structure, resting on piles, which would have been more like a bridge than a roadway, they should have said so. The resolution is silent upon the subject, for the words "height above the meadow, three feet," refer to the bridge, and whatever was said between the parties before it was passed, assuming it to be admissible, showed that the defendant wished to build a solid roadway on the south side, such as he had already built on the north side. He applied orally to the plaintiffs for authority to build a roadway and bridge. They went over the ground with him, saw the situation, advised with the neighbors at a public meeting, and on receiving the consent of all but one out of over two hundred, granted his application, specifying the kind of bridge, but making no specification as to the roadway. There is no evidence to support the conclusion of the trial judge that it was the intention of the parties to have the roadway built of timber. As the affirmance by the Appellate Division does not appear to have been unanimous, we have searched the record for evidence bearing upon the question, but find that nothing was said or done to indicate such an intention. No method of construction was suggested in the preliminary interview, except as already mentioned, when the defendant pointed to what he had done and stated what he wanted to do. One out of the thirteen trustees testified that he did not hear the defendant say "he was going to build a bridge there of dirt," while the others were not sworn. Assuming that the trial judge was not

bound to believe the defendant, because he was interested, still this silence is significant, and if the defendant's evidence is rejected, there is nothing left on the question of intention except the resolution itself.

The effect of a solid roadway in holding the water back, after a heavy storm, was not spoken of, so far as appears, and if the plaintiffs had wished protection from such a result, they doubtless would have made provision for it in the resolution, the same as they did with reference to protecting the navigation of the channel. They took no such precaution and cannot now enjoin the defendant because they failed to do what they might have done.

The doctrine of election, on which the Appellate Division relied to some extent, but upon the theory that the right conferred was only a license, does not apply to a franchise, and the doctrine of practical construction, relied upon by the Special Term, has no application, because the wooden structure was but temporary, as we must assume, since the defendant so testified, and by a ruling of the court based upon the objection of the plaintiffs, duly excepted to, was prevented from giving further evidence upon the subject. A temporary structure in the form of trestlework, for immediate use and as an aid in building a bridge, is common in improvements of this character, and as there was no express limitation as to time, the defendant had a reasonable time to complete the work. The injunction from the Federal court, which he was prevented from showing by the objections of the plaintiffs, was a material fact for the consideration of the court upon the question. The grant of an easement or franchise carries with it whatever is essential to its enjoyment and confers the right to repair and rebuild. (*Roberts v. Roberts*, 55 N. Y. 275; *Huntington v. Asher*, 96 N. Y. 613; Washburn on Easements, 39, 565.) The defendant waived no right under his franchise by building a temporary structure in the first instance.

We think the defendant had the right to build any reasonable and ordinary roadway, such as an embankment of earth, but whether he could dig upon the land of the plaintiffs in

order to get the material is open to question, and as the matter has not been fully argued we do not now decide it. The evidence suggests, but does not show, that the earth and sand of the roadway may, unless confined in its place, ultimately wash away somewhat and result in the formation of sand bars which will obstruct navigation. We pass upon no question relating to this subject. The complaint should not be dismissed because the investigation upon the trial under review was not thorough enough to exhaust the facts and a new trial may develop a different situation in some respects.

The judgment should be reversed and a new trial granted, with costs to abide the event.

PARKER, Ch. J., GRAY, BAILETT, MARTIN and WERNER, JJ., concur; CULLEN, J., not sitting.

Judgment reversed, etc.

MARTHA PALMER, Respondent, v. HELEN C. PALMER et al.,
Appellants.

1. MARRIAGE — DOWER. In an action for the admeasurement of dower, in the absence of proof that a husband did not know his first wife was living when he married a second time, that fact will not be presumed upon the ground that otherwise he would be guilty of crime, when, if such presumption were to obtain, he would be guilty of crime in contracting a third marriage.

2. CONFLICTING PRESUMPTIONS. Where there are conflicting presumptions of unequal weight, the stronger will prevail, and the presumption which has the least probability to sustain it must yield to the more probable one.

Palmer v. Palmer, 27 App. Div. 632, affirmed.

(Argued January 19, 1900; decided February 27, 1900.)

APPEAL from a final judgment of the Supreme Court, entered August 3, 1898, upon an order of the Appellate Division of the Supreme Court in the third judicial department, affirming an interlocutory judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Richard H. Thurston for appellants. At the time Morris W. Palmer married Alice C. Huff, his first wife, Sarah F. Swayze, had absented herself for the space of five years without being known to be living during that time, and such second marriage was voidable only, and for all purposes was valid until its nullity should be pronounced by a court of competent authority. (2 R. S. 139, §§ 5, 6; *White v. Lowe*, 1 Redf. 376; *Valleau v. Valleau*, 6 Paige, 207; *Price v. Price*, 124 N. Y. 589; *Cropsey v. McKinney*, 30 Barb. 54; *Griffin v. Banks*, 24 How. Pr. 213; *Fordham v. Gouverneur Village*, 5 App. Div. 565; *Jones v. Zoller*, 29 Hun, 551; 32 Hun, 280.) The presumption is that at the time Morris W. Palmer was married to Alice C. Huff, his first wife had absented herself for the space of five years without being known to him to be living during that time. (*Valleau v. Valleau*, 6 Paige, 207; *Starr v. Peck*, 1 Hill, 270; *Willson v. Betts*, 4 Den. 201; *Hoffman v. Hoffman*, 6 App. Div. 84; *People v. Pease*, 27 N. Y. 45.)

George McCann for respondent. There is no evidence in the case that Morris Palmer ever made an inquiry, or that he had any reason to believe his first wife to be dead, when he married a second time, and such facts will not be presumed. (*McCarter v. Camel*, 1 Barb. Ch. 463; *Jones v. Zoller*, 32 Hun, 280; *Cropsey v. McKinney*, 30 Barb. 47; *Alizanian v. Alizanian*, 28 Misc. Rep. 638; *Spicer v. Spicer*, 16 Abb. Pr. [N. S.] 112; *Price v. Price*, 124 N. Y. 589; *Safford v. Safford*, 31 Abb. [N. C.] 73; *Smith v. Woodworth*, 44 Barb. 196; *Amory v. Amory*, 6 Robt. 514; *Blossom v. Barrett*, 37 N. Y. 434.)

MARTIN, J. This action was for the admeasurement of dower. The only question presented is whether the plaintiff was the widow of Morris W. Palmer who died seized of the real estate

in question. In February, 1874, he married Sarah F. Swayze, with whom he lived and cohabited for about a year, when they separated, he continuing his residence in or near the city of Elmira, while his wife lived in the village of Canandaigua, seventy-nine miles distant. August 10, 1889, he married Alice C. Huff, and in September, 1890, he paid her two hundred dollars, in consideration of which she gave him a general release from any and all liability for her support or otherwise. He married the plaintiff January 1, 1896, and lived and cohabited with her until his death which occurred October 24, 1896. Subsequently to his second marriage, and in October of that year, he commenced an action against his first wife for an absolute divorce, which resulted in a judgment in his favor, entered December 6, 1889.

The finding of the trial court to the effect that the decedent's second wife had no relations and never saw or had any communication with him after September 3, 1890, is not justified by the evidence, but the contrary is plainly established. Therefore, in the further discussion of this case, we must consider the questions involved as though there was no finding to that effect. That finding is, however, unimportant in our view of the case.

The appellants contend that the plaintiff's marriage was void, for the reason that the decedent was lawfully married to his second wife, and that the relation of husband and wife existed between them at the time of the plaintiff's marriage. The undisputed proof is to the contrary. The appellants' argument is based solely upon the theory that, although at that time the decedent had a wife living, yet, the second marriage was valid because his first wife had left him more than five years previous to his second marriage and there was no direct evidence that he had heard from her or knew she was living during that time. Upon these facts it is claimed that, under the statute, the marriage to the second wife was void only when its nullity was pronounced by a court of competent jurisdiction, and that not having been adjudged void it was valid and rendered the marriage of the plaintiff unlawful.

There is no evidence that the decedent did not know that his first wife was living when the second marriage occurred, and the circumstances indicate that he probably knew that fact.

This appeal is based solely upon the ground that the presumption is that the decedent had no knowledge that his first wife was living when the second marriage occurred, because if he had, the latter would have been bigamous and the law will presume that he was not guilty of a crime. While many cases are cited by the appellants to the effect that crime will not be presumed, an examination of them will disclose that the questions involved were essentially different from those involved in the case at bar, and arose under very different facts and circumstances. In this case, if the presumption contended for is to obtain, it follows that the third marriage was bigamous. If no such presumption arises, then it is manifest that under the proof the second marriage was void and the third is valid. Where there are conflicting presumptions of unequal weight, as that of the continuance of life and that of innocence of crime, the stronger will prevail. (*The King v. Twynning*, 2 B. & A. 386.) But in this case, as the conflicting presumptions are equal and each involves the commission of a crime, we are of the opinion that they neutralize each other and no effect should be given to either. Still, if that conclusion is incorrect, and the presumption which has the least probability to sustain it must yield to the more probable one (*Clayton v. Wardell*, 4 N. Y. 230), the same result is reached. The proof in this case is meagre, yet sufficient to indicate a much stronger probability that the third marriage was valid than that the second was lawful.

The judgment should be affirmed, with costs.

PARKER, Ch. J., O'BRIEN, HAIGHT and VANN, JJ., concur ;
BARTLETT and LANDON, JJ., not sitting.

Judgment affirmed.

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s 162	645
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s 163	600
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s 165	288

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75 AD*250

VIRGINIA K. HASCALL, Appellant; v. VINOENT C. KING, JR., and ANNA LOUISA KING, Individually and as Executor and Executrix of and Trustees under the Will of VINCENT C. KING, Deceased, Respondents, and MAMIE K. SMITH et al., Appellants.

1. TRUST TO USE RENTS AND PROFITS TO PAY MORTGAGES, A TRUST FOR ACCUMULATION. The application of part of the income of a trust estate to the payment of mortgages thereon, thereby increasing the capital of the estate by decreasing the burden thereon, constitutes an accumulation within the meaning of the Revised Statutes (1 R. S. 726, §§ 37, 38) prohibiting the accumulation of rents and profits of real estate, except during the minority and for the sole benefit of minors, and is invalid notwithstanding such accumulation takes the form of an extinguishment of indebtedness, and is limited to the surplus income remaining after the payment of an annuity and restricted to the lifetime of the annuitant.

2. TRUST TO LEASE REAL PROPERTY FOR ABOVE PURPOSE INVALID. The authority to create an express trust to "lease," as well as sell or mortgage real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon, conferred by subdivision 2 of section 55 of the Revised Statutes (Vol. 1, p. 728), now section 76 of the Real Property Law (L. 1896, ch. 547), which defines the purposes for which express trusts may be created, does not authorize the creation of an express trust by will empowering the trustee to take the rents and profits of land and apply them, or part of them, during the lifetime of an annuitant to the payment of mortgages, as this would decrease the burden upon the trust estate and thereby increase the capital thereof in violation of the provisions which prohibit the accumulation of the rents and profits, except during the minority and for the sole benefit of minors.

3. PRIMARY OBJECT OF TRUST SUSTAINED ALTHOUGH SECONDARY OBJECT INVALID. The primary object of a testamentary trust being to provide an annuity for testator's wife, and being separable from a secondary object and ulterior provision for the payment of mortgages out of any income remaining after paying such annuity, is valid and will be sustained although the secondary provision be void.

Hascall v. King, 28 App. Div. 280, modified.

(Argued January 11, 1900; decided February 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered

April 22, 1898, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term.

This action was brought for the construction of a will, and for the partition of the real estate of the testator. The will, after giving to his son, Vincent C. King, Jr., his interest in the business of a firm of which the testator was a member, and in certain factory property, subject to the payment to his widow during her life, or as long as she remained his widow, of \$2,500 a year, provided that, when the real estate subsequently mentioned in the will was relieved from mortgages, so that a clear net income of \$5,000 a year could be realized therefrom, to be paid to his widow, his son should then be relieved from the payment of the said \$2,500; he also devised to his son a farm at Wilton, Saratoga county; and, further, by the 6th clause of his will, gave to his executors and trustees the rest of his personal estate, and, as stated in the will, "all the real estate of which I may die seized or possessed (excepting only the premises in which I may reside and be the owner of at the time of my death, and which I have specifically devised in the fifth clause of this my last will) in trust," to collect the rents and income and pay the taxes, assessments and charges and for the repairs thereon; to pay to his widow \$2,500 a year as long as she remained his widow, and to pay her a like further sum in case his son, Vincent C. King, Jr., should default in the payments to the widow required by the will to be made by him, and "after the payment of the taxes, assessments, repairs, interest on mortgages, insurance and all charges against my estate, and the payment of the income hereinbefore named to my wife, I direct my said executors and trustees to apply the balance of the net income of my estate to the payment and discharge of any and all incumbrances or liens of any kind upon my property;" and when all such payments were made he directed that the surplus income should be divided among his children. It was sought by this action to obtain such a construction of the will as would result in a judgment declaring void the trust therein

created and permitting a partition of the testator's real estate and a distribution of his personal estate as though he had died intestate.

The further material facts are stated in the opinion.

Peter B. Olney and *Nathaniel S. Smith* for appellants. The 6th paragraph of the will is invalid, because it directs an accumulation of rents and income for an unlawful purpose, contrary to the statute. (1 R. S. 726, §§ 37, 38; 773, 774, §§ 3, 4; *Pray v. Hegeman*, 92 N. Y. 508; *Boynton v. Hoyt*, 1 Den. 54; *Cowen v. Rinaldo*, 82 Hun, 485; *Matter of Fisher*, 25 N. Y. Supp. 80; *Wells v. Wells*, 20 Abb. [N. C.] 225; *Matter of Hoyt*, 71 Hun, 13; *Matter of Hayden*, 77 Hun, 222; *Harris v. Clark*, 7 N. Y. 242; *Kennedy v. Hoy*, 105 N. Y. 134.) There can be a valid accumulation of rents, income and profits of property only during minorities, and for the sole benefit of minors. The accumulations of such rents and income, and the application thereof generally to the payment of the principal of mortgages upon real estate, is invalid, and in the case at bar the accumulation of such rents and income, and the application thereof to the payment of mortgages, is such an essential part of the scheme of the will that the other substantial provisions of the will, dependent upon it, fall with it. (*Harris v. Clark*, 7 N. Y. 242; *Kilpatrick v. Johnson*, 15 N. Y. 325; *Manice v. Manice*, 43 N. Y. 303; *Pray v. Hegeman*, 92 N. Y. 509; *Barbour v. De Forest*, 95 N. Y. 13.) The factory property and the Saratoga farm, though by previous clauses in the will otherwise devised, by the plain language of the 6th paragraph are brought and included within the provisions of that clause. (*Van Nostrand v. Moore*, 52 N. Y. 12; *Noble v. Thayer*, 19 App. Div. 446; *Goodwin v. Coddington*, 154 N. Y. 283; *Banzer v. Banzer*, 156 N. Y. 429.) The judgment of the Appellate Division is erroneous, in that it defeats the purpose of the statute prohibiting accumulations, and is against the weight of the decisions construing the statute. (*Vail v. Vail*, 4 Paige, 332; *Matter of Rogers*, 22 App. Div. 429.) The jurisdiction

of the court to entertain this action, to determine the validity, construction or effect of the testamentary disposition attempted to be made by the testator by his will, and incidentally for a partition of the real estate, is well established. (Code Civ. Pro. §§ 1537, 1866, 2624; *Read v. Williams*, 125 N. Y. 566; *Allen v. Allen*, 149 N. Y. 280; *Corley v. McElmeel*, 149 N. Y. 228; *Weston v. Stoddard*, 137 N. Y. 127; *Ellerson v. Westcott*, 148 N. Y. 153.)

William A. Boyd for respondents. There was only included in the residuum the lands and premises described in the plaintiff's complaint as parcels 2, 3, 4 and 5. (*Campbell v. Beaumont*, 91 N. Y. 464; *Clarke v. Leupp*, 88 N. Y. 231; *Roseboom v. Roseboom*, 81 N. Y. 359; *Byrnes v. Stilwell*, 103 N. Y. 460; *Lambe v. Eames*, L. R. [10 Eq.] 267; *Oot-hout v. Rogers*, 59 Hun, 97; *Washbon v. Cope*, 144 N. Y. 297; *Benson v. Corbin*, 145 N. Y. 359; *Banzer v. Banzer*, 156 N. Y. 435; *Schettler v. Smith*, 41 N. Y. 341.) The provisions of the 6th paragraph of the will create a valid trust for the executors. (2 R. S. [9th ed.] 1997, § 55; *Garvey v. McDevitt*, 72 N. Y. 556; *Becker v. Becker*, 13 App. Div. 342; *Parks v. Parks*, 9 Paige, 110.) The provision contained in subdivision C of the 6th paragraph of the will is not a direction to accumulate a portion of the rents of the lands and premises. (*Matter of Gautert*, 136 N. Y. 109; *Cahill v. Russell*, 140 N. Y. 402.) If, however, this court should conclude that the direction contained in subdivision C of the 6th paragraph of the will, to apply the balance of the net income of the estate to the payment and discharge of any and all incumbrances or liens of any kind upon the property, is invalid, then such balance should belong to the persons presumptively entitled to the next eventual estate, and the provisions of the will in other respects are valid. (*Becker v. Becker*, 13 App. Div. 353; *Harrison v. Harrison*, 36 N. Y. 543; *Savage v. Burnham*, 17 N. Y. 561; *Williams v. Williams*, 8 N. Y. 538; *Phelps v. Pond*, 23 N. Y. 82; *Kilpatrick v. Johnson*, 15 N. Y. 323-326; *Van Schuyver v. Mul-*

ford, 59 N. Y. 432; *Kennedy v. Hoy*, 105 N. Y. 134; *Cowen v. Rinaldo*, 82 Hun, 486; *Tiers v. Tiers*, 98 N. Y. 573.)

PARKER, Ch. J. Since 1828 the Revised Statutes have in terms prohibited the accumulation of the rents and profits of real estate and of the income of personal property, except during the minority and for the sole benefit of minors. (1 R. S. 726, sections 37, 38.) The last sentence of section 38 establishes the penalty to be visited upon all attempts to offend against these provisions, and reads as follows: "And all directions for the accumulation of the rents and profits of real estate, except such as are herein allowed, shall be void." The revisers, in their report, assigned as a reason for limiting the power of accumulation to one of the three cases specified in the statute of 39 and 40 George III (Ch. 98), namely, "during the minority of any person or persons who, under the deed or will directing the accumulation, would, if then of full age, be entitled to such rents and profits," that "it is to the period last indicated that the revisers propose to confine the power of accumulation, conceiving that this restriction furnishes the most effectual means of guarding against the abuses to which directions of this nature are admitted to be liable, and believing that it embraces the only case in which the purpose of the accumulation is such as ought to be sanctioned, namely, for the benefit of infants entitled to the next eventual estate." The purpose of the revisers is made so clear by their report, and the language employed by them in drafting sections 37 and 38 so aptly expresses that purpose, that no case prior to this one can be found in this court where an attempt has been made to uphold a trust which did not provide that the accumulated income should, in part at least, be used for the benefit of minors. And the understanding of the courts, as well I think as that of the legal profession generally, as to the effect of sections 37 and 38, found expression through Judge ANDREWS in the case of *Pray v. Hegeman* (92 N. Y. 508-515) as follows: "The main purpose of the thirty-seventh section of the statute was not to

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limit the term of accumulation previously permitted. The legislature intended to uproot the doctrine that the rents and profits of property might be accumulated and the enjoyment postponed, with a single exception." The learned judge further said: "The statute does not permit an accumulation of the rents and profits of land, or the income of personal property for the benefit of adults for any period of time, however short. The general policy of our law favors the greatest freedom of alienation of property consistent with the necessities of families, and the making of reasonable provision for the various contingencies which may be expected to arise, requiring the postponement of the vesting of estates, and the suspense of the power of alienating the *corpus* of property is permitted only within narrow limits. But the right to direct the accumulation of the fruits and profits of property is much more restricted than the right to control the property itself. It is permitted *only in a single case* and *for a single purpose*, viz., during minority, and for the benefit of the minor during whose minority the accumulation is directed." This was said by the learned judge not only with sections 37, 38 and 55 before him, but, as appears by his discussion of the cause, having in mind the case of *Hawley v. James*, which we shall consider later.

In the *Pray* case the will provided for an accumulation during minority and, after the expiration of minority, the giving of the income arising from the accumulated fund to the minor for life, the principal on his death to his issue or over to other persons. Other attempts have been made to thwart the purpose of the statute by appearance of conformity with its provisions, such as in the cases of *Boynton v. Hoyt* (1 Denio, 54); *Kilpatrick v. Johnson* (15 N. Y. 322), and *Barbour v. De Forest* (95 N. Y. 13), but without avail; for this court has ever been faithful in giving full force and effect to both the letter and spirit of the statute. Only two cases beside this one have been found in the reports of this state, where it has been held that a trust is valid which permits some part of the rents and profits of the real estate to be applied in

payment of mortgages thereon. Those cases will receive consideration later on, for our next step is to inquire whether the trust attempted to be created by this will authorized the accumulation of some part of the rents and profits of certain real estate, and the application thereof in payment of an indebtedness of the testator secured by mortgages on certain parcels of his real estate.

The will was executed on the 13th day of January, 1896, and in July following the testator died, leaving a widow and four children, all of whom were of full age. His real estate consisted of six parcels in New York county and a farm in Saratoga county. If all of the real estate be carried into the trust under the sixth clause of the will, as appellant contends, then its purpose is to provide that the net rent, income and profits of real estate of the value of about \$206,000, plus the value, which has not been proved, of the farm and the parcel known as No. 49 West 88th street, shall, after the payment of the sums directed to be paid to the widow annually, be devoted to the payment of mortgages aggregating \$46,500, one of which, at least, a mortgage for \$25,000, was not due at the time of the death of the testator. If the factory property and the Saratoga farm are held to be disposed of by the third and fourth provisions of the will, then the rent, income and profits of the real estate devised in trust are of the value of \$156,000, and are to be devoted, after the payment of a certain sum annually to the widow, to the payment of interest and principal of mortgages, aggregating \$34,000.

In other words, the scheme of this provision of the will is to increase the value of the estate from \$206,000 to \$252,500, if one construction be adopted, and if the other, then from \$156,000 to \$190,000. The object of the provision is to have a certain portion of the income go into and form a part of the estate by decreasing the burden resting upon it, thereby inevitably increasing the capital of the estate; and if such object can be carried out, the principal of the estate will ultimately be greater than at present by \$46,500 in the one case and by \$34,000 in the other. The result aimed at is precisely the

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same as if the testator had directed that the surplus income should be deposited and held until the principal of the estate should be divided among those entitled to it at the termination of the trust. If a part of the income of the real estate of which the testator died seized and possessed be permitted to be devoted to the payment of mortgages thereon, all of the income may be devoted to such purpose, and hence it will be easy for a man desiring to postpone the division of his estate as long as possible to devote all of his estate to the purchase of income-producing real estate having a substantial equity over and above the mortgages thereon, and apply all of the surplus income arising therefrom during two lives in being to the reduction of the principal of the mortgages, and thus turn over at the end of the trust term the principal of his estate, plus the accumulations of such principal during a comparatively short or a very long period, dependent of course upon the length of life of the survivor of the two persons by whom the trust term is measured. For example, if A. should buy of B. real estate of the value of \$100,000, paying \$50,000 on account of the purchase price and giving a long term mortgage thereon for \$50,000, with an agreement that the net income of the property might be applied in payment of the interest on the mortgage and in the reduction of the principal until the entire principal sum should be paid, and should then devise the real estate in trust with directions to the trustee to thus apply the income during the lives of the two persons named therein, there would be a fair chance that the distribution of the estate would be postponed until the mortgage could be paid off and the capital of the estate to be distributed should have been increased from \$50,000 to \$100,000. While the case put as an illustration differs in detail from the one under consideration, it does not differ in principle, and if the one is authorized by statute, so is the other.

The suggestion that a restricted meaning should be given to the word "accumulation" as used in the statute, which would operate to make it ineffective unless the trustees be directed to retain the income for a considerable time to await the matur-

ing of mortgages, has no support either in the judicial history which led to its use by the revisers or in the spirit of the statute employing it; but it should be said in passing that the mortgage of \$25,000 did not become due until some time after the probate of the will. The capacity which a man had in England under the common law to lock up the income of his estate, whether real or personal, was finally carried to such extremes that a will was made in 1796, by which a testator devised his real estate, the income of which was four thousand pounds per annum, and his personal estate estimated at half a million pounds sterling, to trustees to accumulate for nine lives, when by the ordinary chances of life the aggregate would amount, at interest, to over nineteen million pounds. (*Thellusson v Woodford*, 1 B. & P. N. R. 396; *S. C.*, 4 Vesey, 227; 11 Vesey, 112.) This will contributed its part toward persuading Parliament of the wisdom of passing the act to which reference was made when citing the report of the revisers of our statutes, and in bringing about the still more drastic action on the part of the legislature. The meaning which the word "accumulation" has in course of time come to have in our law is stated in the Century Dictionary as follows: "The adding of the interest or income of a fund to the principal, pursuant to the provisions of a will or deed *preventing its being expended*. The law imposes restrictions on the power of a testator or creator of a trust to prohibit thus the present beneficial enjoyment of a fund in order to increase it for a future generation."

It is precisely that which is attempted in this case, namely, a withholding of a portion of the income from present beneficial enjoyment, to the end that the estate may be augmented in value, and thus, at the termination of the trust, pass to those whom the testator would have enter into the enjoyment of it at that time. Had the testator intended otherwise, he could readily have provided for satisfying the incumbrances by a sale of one or more of the parcels of real estate that he owned in the city of New York. It was all marketable real estate, but he chose not to sell it, and instead attempted to build a

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trust on a plan in violation of the letter and the spirit of the statute which prohibits the swelling of an estate by the accumulation of income, except for the benefit of minors and during their minority. The books will be searched, I think, in vain for a case in this state, prior to this one, in which it is suggested that the application of the income of a trust estate in the payment of mortgages does not constitute an accumulation, as that word is employed in the statute. The other view is adopted in the few cases in which the question was presented. *In re Fisher's Estate* (25 N. Y. Supp. 79) Surrogate RANSOM had up for consideration a will empowering executors to pay off mortgages by applying for that purpose 15% of the net income of the estate, and it was held that the trust was void, because in violation of sections 37 and 38 of the statutes. The learned surrogate, in the course of his opinion, said: "The application of a part of the income of the trust estate for the payment of mortgages on the real estate, forming part thereof, is invalid, as it provides for an accumulation of such income for a purpose not permitted by the statute. * * * It goes into, and forms part of, such estate, and increases the capital, the income of which is distributable under the trusts in the will, and the augmented principal ultimately. The provision is in effect precisely the same as if the testator had, in so many words, required the trustee to apply the income to swell the principal of the trust fund." *Wells v. Wells* (30 Abbott's New Cases, 225) was a suit in equity brought for the construction of a will, the second clause of which in part provided: "But if there is not enough derived from the proceeds of said sale (referring to a piece of property that he had ordered sold for the payment of debts) to pay all of my said debts (and the court, in construing the will, held the debts thus referred to were debts secured by mortgage upon the lands affected), that then for my said executors, or the survivor of them, to apply the net income from what other property I may die possessed of towards the payment of said debts, until all my said debts are paid in full." This is held to have been in violation of the provisions of the Revised

Statutes regulating the accumulation of rents and profits. In the *Matter of Hoyt* (71 Hun, 13), the will in part directed the executors to lease all the rest, residue and remainder of the testator's real and personal property, and after deducting the taxes, insurance and interest on mortgages from the rents and income arising therefrom, to deposit the balance in a savings bank in order to create a fund to liquidate or help pay off an indebtedness against the estate, and this is held to have been in contravention of the statute and void. In *Matter of Hayden* (77 Hun, 219) the testator did not provide in terms for the accumulation of income, but in carrying out the provisions of his will it so happened that there was a small accumulation of income from securities set apart for the production of annuities, and the question presented was whether such amount of income should have been paid to the two daughters of testator upon the division of the estate, or whether it should be held as principal by the executors of the will as trustees of the shares of the daughters under the codicil, and it is held in an opinion written by Presiding Justice VAN BRUNT that the testator "had no power * * * by any means, direct or indirect, to prevent the absolute vesting of the income derived from his estate in somebody, and he could only direct any portion of such income to be accumulated during the minority of the owner of the share of his estate from which it was derived." In *Matter of Rogers* (22 App. Div. 431), Mr. Justice CULLEN tersely stated the proposition in these words: "But if a testator's intent is to make that principal which is income in the case of a trust of the nature of the one before us, such intent is not in conformity with law, but in express contravention of it." Other cases in which it is assumed without discussion that such a disposition of income constitutes an accumulation within the meaning of the statute, will be referred to later on, when I come to an examination of the cases in which sections 37, 38 and 55, and their relation to each other are directly considered.

But I pass from the consideration of the question whether there was an accumulation in this case, with the assertion

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that it cannot be denied that the will provides for the increase of the estate from the rents, income and profits arising therefrom, and it none the less provides for its enhancement from the income of the trust estate, because the method provided takes the form of an extinguishment of indebtedness. The statute aims to prevent such a disposition of an estate as would deprive some one of the present enjoyment of each and every dollar of the net income, with the single exception of minors, and the court should give full effect to the statute, and not countenance an accumulation of income by indirection where it would not by direction.

We come now to the section which is put forward in justification of a decision that not only opens a door to a violation of the provisions of sections 37 and 38, but points out a method by which it can be done as effectively as if the statute in terms permitted the investment of the income arising from a trust estate during a period of two lives in being in the purchase of additional real estate. The method may not be quite as convenient of execution, as it requires, on the part of the testator, in his lifetime, other action than that of simply making a will; but it is fully as effective, as has already been shown.

Subdivision 2 of section 55 of the Revised Statutes (Vol. 1, p. 728) is relied upon as creating an exception to the rule established by the statute against accumulations, an exception which, if allowed, may be destructive of the rule. Section 55 (now section 76 of the Real Property Law) reads as follows:

“Purposes for which express trusts may be created.

“An express trust may be created for one or more of the following purposes:

“1. To sell real property for the benefit of creditors;

“2. To sell, mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon;

“3. To receive the rents and profits of real property, and apply them to the use of any person, during the life of that person, or for any shorter term, subject to the provisions of law relating thereto;

"4. To receive the rents and profits of real property, and to accumulate the same for the purposes, and within the limits, prescribed by law."

It is under the second subdivision, which, besides giving authority to sell and to mortgage lands for the benefit of legatees and for the purpose of satisfying any charge thereon, also authorizes the leasing of lands for such purpose, that the claim of the right to receive the rents and profits of land and to apply them from time to time in payment of any charge on the land, is made. It will be noted that by the two following subdivisions, 3 and 4, the trustee is specifically authorized, by 3, to receive the rents and profits of lands, to apply them as they are received in the first case, and, by 4, to accumulate them for the purposes authorized by, and within the limits prescribed in, the first article of the title, and, while subdivision 2 does not in terms authorize the trustee to receive the rents and profits of land, it is sought to give to the word "lease" such a construction as will import into the subdivision that authority. In other words, notwithstanding two of the four subdivisions of section 55 expressly authorize the trustees to receive the rents and profits of land, while the other two subdivisions do not, but instead treat of the leasing of lands precisely as of their selling and mortgaging, it is proposed to give to the word "lease" appearing in that connection, such scope and effect as will permit the creation of a trust for the leasing of lands by which there can be an accumulation in violation of the provisions of sections 37 and 38, to which subdivision 4 of section 55 applies; and the strongest argument ever presented in support of that contention is made by the learned justice who, in *Becker v. Becker* (13 App. Div. 342-349), says: "It is the common eulogium of the Revised Statutes that in no other compilation of law are technical terms and words of art used with more precision or as appositely as in that work." The argument by which the conclusion is reached that the second subdivision authorizes the creation of an express trust for the purpose of the accumulation and application of the rents and profits of land in

payment of mortgages or other charges thereon, is in brief that the word "lease" must be given its strict definition, as a contract for the possession and profits of lands and tenements on one side and a recompense of rent or other income on the other, and as the reception of rent is the fundamental idea connected with a lease, and the relation of landlord and tenant must be established in order that the landlord may receive the rent, it follows that it was the intention of the revisers in the use of the word "lease" to authorize the leasing of lands for a long or short period for a fixed annual rental, or to work on shares with authority in the trustees to apply the net rent, or net income, or profits resulting therefrom, in the payment of mortgages or other liens upon the whole or some part of the real estate devised in trust. It must be conceded that if there were no other provisions of the statute bearing directly or indirectly upon the subject of the receipt of rents and profits of lands and their accumulation than is to be found in subdivision 2, the argument to which I have referred could not well be met. But as it is, we find that by giving to the word "lease" that full force and effect which it is urged can be given, it necessarily results in permitting the creation of a trust by which may be increased a testator's estate by adding to its capital the rents and profits of land in violation not only of the spirit, but of the express letter of the statute as found in sections 37 and 38 of the same title.

Again we find that the authorization to lease lands for the benefit of legatees, or for the purpose of satisfying any charge thereon, is to be found in a subdivision which is in all other respects (and I think in respect to leasing as well) a provision for alienation, and not for the suspension of the power of alienation. The trusts therein authorized are to sell land, or some interest in it, the land descending subject to the execution of the trust, which may include either the power to sell or the power to mortgage, or the power to lease for a gross sum to be applied by the trustee for the benefit of legatees, or in satisfaction of any charge thereon. In that connection, it should be observed that the two following subdivisions pro-

vide in express terms that the trustee should receive the rents and profits of lands, and it is significant that the opening sentence of each of such subdivisions should employ that language when, in the second subdivision, there is no suggestion that the power to receive rents and profits is conferred. Again, it is significant that whereas sections 37 and 38 provide in terms for an accumulation of the rents and profits of real estate for the benefit of one or more minors, and prohibit the accumulation of such rents and profits for any other purpose, the fourth subdivision of section 55 should provide that an express trust may be created for that purpose. Thus, the revisers open section 37 with an authorization for "An accumulation of the rents and profits of real estate," and close section 38 with the declaration: "All directions for the accumulation of the rents and profits of real estate, except such as are herein allowed, shall be void;" while subdivision 4 of section 55, which authorizes an accumulation for the purposes expressed in sections 37 and 38, empowers the trustee "to receive the rents and profits of lands." A careful repetition of the quoted words, in each of the sections 37 and 38 and subdivision 4 of section 55, in view of the known accuracy of the revisers, strongly indicates an intention to exclude from a trust to mortgage, sell or lease lands, the right to receive the rents and profits of lands.

There is a meaning that can be given to the word "lease," in the connection in which it is used, which will make all of the provisions that we have been considering harmonious, and give to sections 37 and 38, prohibiting an accumulation of income, except for the benefit of minors, their full force and effect; and it would seem as if it were the plain duty of the court to so construe the statute as to harmonize the several provisions and at the same time effectuate the general policy of the statute. The sense in which the word "lease" is employed cannot be better portrayed than in the language of Presiding Justice VAN BRUNT in *Cowen v. Rinaldo* (82 Hun, 479-485): "The evident intention of the statute was the creation of a trust to sell land and receive the proceeds thereof for

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the benefit of creditors, or for the benefit of legatees, or for the purpose of satisfying any charge thereon, to mortgage land and receive the proceeds thereof for the benefit of legatees or for the purpose of satisfying any charge thereon, and to lease lands for a given sum which the trustee is to receive for the benefit of legatees, or for the purpose of satisfying any charge on said land, the fee of the land descending." That construction seems to me, in view of the other provisions of the statute, the natural one, and, therefore, the one that should be adopted.

I come now to a consideration of the cases bearing upon this question. The first case is that of *Hawley v. James* (16 Wend. 62). It was decided in 1836, some eight years after the enactment of the Revised Statutes. It is there held that subdivisions 1 and 2 of section 55 provide for a trust for alienation for the purpose of paying debts and legacies and charges on real estate, but not for a trust to receive the rents and profits of lands devised to trustees. Judge BRONSON says in the course of the discussion: "There may be some difficulty in ascertaining why the word *lease* was inserted in the second subdivision, and if we attach to it all the consequences which may be deduced from the common-law doctrine in relation to the power of making leases, it will include the right to take rents and profits. But that consequence will not follow in this case, for the reason that it would be against the manifest intent of the legislature; and it is one of the first and most important rules of interpretation, that a statute shall be so construed as to carry into effect the intent of the law-makers. * * * The first subdivision authorizes a trust 'to *sell* lands for the benefit of creditors.' This is a trust for alienation, and it would have been absurd to subject it to a provision against perpetuities. The second subdivision is of the same character. It authorizes a trust to '*sell, mortgage or lease* lands for the benefit of legatees, or for the purpose of satisfying any charge thereon.' A *mortgage* is one mode of aliening the estate or a portion of it equal in value to the mortgage debt. In this case as well as where an absolute fee

is transferred, the trust is at an end the moment the conveyance is executed, so far as relates to any power over the estate. The trustee has no further office to perform but that of making the proper application of the money. There is no suspense of the power of alienation, and it would therefore be idle to provide any safeguard against perpetuity. Was the word *lease* in this connection used for the purpose of authorizing a trust of a different character? I think not. * * * If there is any possible way in which the power to lease can be exercised without suspending alienation, effect can be given to every word in the subdivision without contravening the manifest intent of the legislature. It is a power to make leases for the benefit of legatees, and I see no objection to demising the land directly to the legatee at a nominal rent for a period long enough to satisfy the legacy: or in the case of a charge on the land, leasing it directly to the person entitled to the debt for a term which will satisfy the charge. It may also, I think, be leased to a third person, reserving the rent to the legatee or person having the charge."

The opinion of Judge BRONSON in that case, written as it was shortly after the enactment of the Revised Statutes and showing as it does careful consideration of the subject, has generally been regarded as the correct construction of those sections and as conclusive upon the subject. About eight years later the chancellor in *Parks v. Parks* (9 Paige Ch. 107), had before him for consideration a will which involved many interesting questions and among the numerous provisions considered was one devising to a trustee in trust certain lots, from the rents and profits of which he was directed to pay the interest on the incumbrances, and use the profits and income for the support of *cestuis que trust*, and to employ as much as should not be required for that purpose in the reduction of the principal of the incumbrances. The chancellor, without referring to *Hawley v. James* (*supra*) and without argument, says: "The Revised Statutes also have authorized the creation of an express trust to lease lands for the purpose of satisfying a charge thereon. The authority of the trustee,

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therefore, to pay the interest of the incumbrances out of the rents and profits of these lots in the first place, and to apply so much of those rents and profits as might be spared from the support of the *cestuis que trust*, to reduce the principal of the incumbrance on their respective lots, was therefore valid; and should be carried into effect, according to the intention of the testator."

The subject was not otherwise considered, and in view of the elaborate discussion of the question when it was before the court in *Hawley v. James*, it would seem as if that question had not been the subject of debate by the counsel who appeared before the chancellor and that his disposition of it was one of first impression. It is true that the decision in the *Parks* case was subsequently affirmed by the Court of Errors (see foot note, 9 Paige Chan. Rep. 127). But we have no evidence that this question was the subject of contest on review. It is now said that the rule laid down by the chancellor in *Parks v. Parks* was adopted by this court in *Leggett v. Perkins* (2 N. Y. 297), and *Van Schuyver v. Mulford* (59 N. Y. 426). But as we read those decisions no such question was involved. In *Leggett v. Perkins* the inquiry was whether a trust, to receive the rents and profits of lands and pay them to a trustee, could be sustained under the third subdivision of section 55, which authorizes a trust to receive the rents and profits of land and to apply them to the use of any person. Upon that question *Parks v. Parks* was cited with approval, but that in nowise constituted an approval of all the other questions passed upon by the chancellor in that case.

In *Van Schuyver v. Mulford* (*supra*) the will of M. gave to his wife the rent, income and profits of his estate during her life, and if they were insufficient for her support, he directed his executor and trustee to pay to her from the body of the estate what should be necessary from time to time, and in another clause he directed that after the death of his wife the rents, income and profits should be paid to his two daughters during life, after whose death the estate was devised to

the issue of his said daughters. *Parks v. Parks* was cited upon the question presented by that will, but it has no bearing upon the question we are now considering. In *Cowen v. Rinaldo* (*supra*) the very question now before us was under consideration, and the court, upon the authority of *Hawley v. James*, and in a very careful opinion by the presiding justice of the court, holds that a trust providing for the collection of rents, income and profits of real estate, and, after the payment of certain legacies and the interest on mortgages, the applying of the remainder of the rents, together with the income and principal of the personal estate, to the paying off and discharging of the principal of mortgages on the real estate, was void. In *Becker v. Becker* (13 App. Div. 342) the court refused to follow this decision of the General Term and that in *Hawley v. James*, and elected instead to treat the paragraph which I have quoted from the long opinion of the chancellor in the *Parks* case as settling the question adversely to the decisions preceding and following it. The decision was made by a divided court and was not required, as I have attempted to show, by the decisions which have preceded it. The decision under review was made by the same court, which relied principally upon its previous decision in *Becker v. Becker*.

I have thus referred to all of the cases to which our attention has been called, in which the question up for decision was directly involved, and it is apparent that this court is at liberty, to say the least, to construe the statutes in accordance with the reasoning of Judge BRONSON in *Hawley v. James*, which not only results in producing harmony between sections 37, 38 and 55, but enables the statute to work out that policy which the revisers intended, a policy which in their wisdom was deemed for the public good and which has not since been seriously challenged.

But it does not follow that the entire trust should be held to be void because of the direction to unlawfully accumulate a part of the income. The rule is that where there are two trust objects, one of which is principal and the other alternative, and the latter only is void, the principal trust may stand

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and the other fall. (*Schettler v. Smith*, 41 N. Y. 328; *Tiers v. Tiers*, 98 id. 568; *Cross v. U. S. Trust Co.*, 131 id. 380.) That rule is applicable to this situation and should govern it. The primary object of this testator, by the creation of this trust, was to provide an income for his wife, the accumulation for the purpose of paying the mortgages being secondary. Indeed, nothing was to be applied in payment of the mortgages until after the sum named by the testator should in each year be paid in full to his wife, the disposition of the balance being a mere ulterior contingent direction, entirely distinct from the primary trust. That being so, the former is separable from the primary trust and will not be allowed to invalidate it, and after the purposes of the primary trust have been satisfied, the surplus income must be distributed among those entitled to the next eventual estate.

In all other respects we agree with the views expressed in the opinion written at the Appellate Division.

The judgment should be so modified as to accord with this opinion, and as thus modified affirmed, with costs to the appellants in all courts, and to the respondent in this court, payable out of the estate.

VANN, J. I concur in the result, because the will directs the application of rents, arising from lands not mortgaged, in payment of mortgages upon other lands, in violation of section 55 of the Statute of Uses and Trusts, which, in my opinion, authorizes the leasing of lands in the usual way, but for the purpose only of satisfying any charge upon the particular lands leased. I do not agree with the conclusion of the chief judge that a valid trust cannot be created to lease lands, in the ordinary sense of the word "lease," for the purpose of discharging liens upon the specific lands directed to be leased. I feel bound to follow the later case of *Parks v. Parks* (9 Paige, 107), where the question was before the court and was necessarily decided by the chancellor and, on appeal from his decree, by the Court of Errors also, rather than the earlier case of *Hawley v. James* (16 Wend. 62), where the

question, although ably discussed in one of the five opinions delivered, was not before the court, and no opinion was adopted by the court.

GRAY, O'BRIEN and BARTLETT, JJ., concur with PARKER, Ch. J. MARTIN, J., concurs in result, and VANN, J., concurs in memorandum; HAIGHT, J., dissents.

Judgment accordingly.

JULIUS F. KRUG, Respondent v. JOHN PITASS et al., Appellants.

1. **LIBEL — ARTICLE REFLECTING ON PHYSICIAN LIBELOUS PER SE.** An article in a Polish newspaper, concerning a physician and druggist largely patronized by Poles among whom the paper circulates, is libelous upon its face, where it refers to his profession and business, calls him a block-head or fool, and appeals to the Poles not to trust themselves or their families to his professional care when he so hated them that he would not help them if he could.

2. **PUNITIVE DAMAGES — WHEN NOT RECOVERABLE.** Punitive damages cannot be recovered in an action for libel for general malice, but only for such particular malice as existed when the libel was published and which had some influence in causing its publication.

3. **MALICE OF ONE, WHEN NOT IMPUTABLE TO OTHER DEFENDANTS.** In an action for libel against several defendants, the malice of one defendant cannot be imputed to the others without connecting proof.

4. **RECOVERY OF PUNITIVE DAMAGES AGAINST ALL FOR THE GENERAL MALICE OF ONE OF THE DEFENDANTS.** Where, in an action against several defendants for libel, to recover damages for the publication of an article libelous *per se*, each of the defendants testifies that he had no malice or ill-will toward the plaintiff, and the latter, in order to show express malice, justifying a recovery of punitive damages, is permitted to prove as against all, that several years before the publication, one of them, who knew nothing about the article until after it had been published, had made statements expressing contempt and ill-will for the plaintiff, never heard by or communicated to the other defendants before the publication, a judgment recovered against all must be reversed, as the general malice proved neither caused nor prompted the publication of the libel, and has, as it must be presumed, entered into the verdict against all in violation of the rights of each.

Krug v. Pitass, 16 App. Div. 480, reversed.

(Submitted January 29, 1900; decided February 27, 1900.)

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163	600
162	154
h 77 AD*	110
d 78 AD*	80
78 AD*	81
j 78 AD*	86

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered April 17, 1897, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

This is an action to recover damages alleged to have been caused by the publication of an article concerning the plaintiff in a newspaper published in the Polish language at the city of Buffalo, known as "Polak W. Ameryce," or the Pole in America. The defendant Pitass was the proprietor of said newspaper, the defendant Slisz the editor, and the article in question was a communication signed by the other defendant, Smeja.

The plaintiff, a practicing physician, kept a drug store in the Polish section of Buffalo, and was largely patronized by the people of that nationality, among whom said newspaper was widely circulated. On the 23rd of February, 1894, the communication in question was published in the Polish language, and, as translated by a witness for the plaintiff upon the trial, was as follows:

"BUFFALO, NEW YORK.

"RESPECTABLE SIRS:

"Excuse me for the trouble I do you, but I must complain of a certain Dutchman doctor who lives from the Poles, dwells among them, and that which he is and which he has, he has the Poles to thank for. However, at every opportunity, he scorns them and talks about them in a contemptible manner. I will now tell you of a certain incident of which I have been a witness. It was on the evening of the 3rd or 4th of February, this year, that I met Dr. Krug at the corner of Broadway and Kuempel street. After the shake of hands I asked him about the health of one of the members of our society, asking him to tell me the truth, whether he really is sick. Dr. Krug got so mad about it that he began to holler as if the devils were skinning him, and abused the Poles for all the world stands. He hollered that the Poles are a damned cattle, a confounded nation, scoundrels, loafers, sows, and so on.

Seeing that the Dutchman was furious with madness, I called his attention that he be more careful in his words, for that can hurt him very much. Dr. Krug answered me, 'I don't care for the Poles. I can get along without them, and you can go to the devil.' This what I have said about I can corroborate under oath, and I wish to be responsible for it. Now, I recall myself to all the Polish societies and all the Poles of Buffalo that they consider whether we can allow to be so disrespected by such a first or second fool as Dr. Krug. Can we trust ourselves and our families under the care of such a man when Dr. Krug so hates the Poles that he could drown each one in a spoon of water? A universal contempt should meet this scoundrel who does not know that the Poles are just as good and maybe better citizens than Dr. Krug. Such people as the latter brings disgrace not only to their own nationality, but also all the American citizens. It would be a great time that the Poles of Buffalo be convinced what kind of an enemy to them Dr. Krug is.

"MARCEL SMEJA,

"1060 Broadway,

"*President of the St. Joseph Society.*"

"The above correspondence Marcel Smeja signed in our presence and said he would be responsible for it.

"J. M. ROZAN.

"M. WOJCIESHOWSKI."

The translation given by a witness for the defendants was substantially the same except that it spoke of the plaintiff as a "German Doctor" instead of a "Dutchman Doctor," and toward the close of the article the version was as follows:

"Now I call myself to all the Polish Societies and to all the Poles in Buffalo, whether we should allow such a first better blockhead or fool, as Dr. Krug, whether to such a man we can entrust ourselves and our families to cure, when Dr. Krug so hates the Poles that he would drown them in a spoon of water. Universal contempt should meet such a good for nothing or fellow, who does not know that the Poles are as good or better citizens than Dr. Krug, for such a man as the

last brings disgrace not only to their own nationality, but the whole American Public. It will be time that Poles in Buffalo should learn how great an enemy of theirs is Dr. Krug."

"Drowning a man in a spoonful of water," as the witnesses on both sides testified, is a Polish expression meaning that the person spoken of "would do anything, but not heal," or that "he would not hurt or help a man if he could."

The defendants answered separately, admitting the publication, but denying the accuracy of the translation as alleged in the complaint. Each denied that he acted through malice and pleaded as a justification that the article was true.

Upon the trial it appeared that the plaintiff had given to a member of a benevolent society, of which the defendant Smeja was president, a certificate that he was ill so as to enable him to obtain "a sick benefit;" that on the 2nd of February, 1894, the plaintiff met Smeja, who inquired about the illness of this man and a controversy arose between them, during which, as it was claimed, the plaintiff abused the Polish people and this led to the preparation of the article by Smeja, who took it to Slisz, the editor, vouched for its accuracy and requested him to publish it. It was then published by direction of the editor, without the knowledge of the defendant, Pitass, who had nothing to do with the publication, except that he owned the newspaper.

Each of the defendants testified that he had no malice or ill-will toward the plaintiff. The defendant Pitass, on cross-examination, swore that he never had any ill-feeling toward the plaintiff, and never told any one that he was going to run him out of town.

The plaintiff was allowed to show, under objection and exception, in due form, that four or five years before the communication was published the defendant Pitass said the plaintiff "was no doctor, as far as he knew about him, and he thought he could cure cattle or pigs, or something of the kind, but not people, and that this place in Buffalo, here, is no place either for him or the man from Fillmore Avenue," and that he would not be very long in Buffalo. This evidence, although

offered in rebuttal, was received, according to the declaration of the trial judge, "as direct evidence on the question of malice."

The jury rendered a verdict in favor of the plaintiff for \$6,250, and the judgment entered thereon having been affirmed in the Appellate Division, by a divided vote, the defendant appealed to this court.

John W. Fisher for appellants. The article proven was not libelous *per se* and no special damages being alleged or proven plaintiff was not entitled to recover. (*Sanderson v. Caldwell*, 45 N. Y. 400; *More v. Bennett*, 48 N. Y. 472; *Foot v. Brown*, 8 Johns. 64; *Camp v. Martin*, 23 Conn. 86; *Winchell v. Argus Co.*, 69 Hun, 359; *Odgers on Slander & Libel*, 64; *Starkie on Slander & Libel*, 110.) The court erred in directing the jury that the article attacked the reputation of the plaintiff as a doctor and was, therefore, libelous *per se*. (*Starkie on Slander & Libel*, 110; *Odgers on Slander*, 64; *Oakley v. Farrington*, 1 Johns. Cas. 130; *Van Tassel v. Capron*, 1 Den. 250; *Sanderson v. Caldwell*, 45 N. Y. 398.) The court erred in admitting under objection and exception proof of ill-will previously felt by certain of the defendants and not by others. (*Starkie on Slander & Libel*, 465; *Clark v. Newsam*, 1 Exch. 131; *Hearne v. De Young*, 119 Cal. 670; *Dyett v. Hyman*, 129 N. Y. 351; *Robertson v. Wylde*, 2 M. & R. 2; *Eviston v. Cramer*, 57 Wis. 570; *Bradley v. Cramer*, 66 Wis. 297; *Haines v. Schultz*, 50 N. J. L. 481; *McCarthy v. Der Armitt*, 99 Penn. St. 83; *Huddleston v. West Bellevue*, 111 Penn. St. 123.)

Leroy Andrus for respondent. The article is in itself of so injurious a character that the law presumes a general loss or damage as a consequence of its publication, and no proof thereof was required, but the plaintiff still had the right to give such proof under the allegations of the complaint. (*Edsall v. Brooks*, 2 Robt. 29; *Moore v. M. Nat. Bank*, 123 N. Y. 420; *Gibson v. Williams*, 4 Wend. 320; *Hartman v. M. J. Assn.*, 46 N. Y. S. R. 183; *Sanderson v. Caldwell*, 45 N. Y.

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Opinion of the Court, per VANN, J.

398; *Moore v. Francis*, 121 N. Y. 199; *Gates v. N. Y. R. Co.*, 155 N. Y. 237; *Gideon v. Dwyer*, 87 Hun, 249; *Stokes v. Stokes*, 76 Hun, 314; *Chiatovich v. Hanchett*, 88 Fed. Rep. 877.) Where in an action for libel brought against several defendants each testifies that he always entertained friendly feelings towards the plaintiff, or that he never entertained ill-feelings towards him, evidence is competent for the purpose of contradiction by showing that some or all of them expressed unfriendly sentiments at some time prior to the publication. (*S. Nat. Bank v. Dix*, 23 N. Y. Wkly. Dig. 367; *Beuerlien v. O'Leary*, 149 N. Y. 33; *Wright v. Nostrand*, 94 N. Y. 41; *Starr v. Cragin*, 24 Hun, 177; *Hotchkiss v. G. F. Ins. Co.*, 5 Hun, 90; *Barrett v. Long*, 3 H. L. Cas. 414; *Harmon v. Harmon*, 61 Me. 233; *Pearson v. Lemaitre*, 5 M. & G. 700; *McDermott v. E. Journal*, 43 N. J. L. 494; *Schultz v. T. A. R. R. Co.*, 89 N. Y. 242.)

VANN, J. The article in question, according to either translation, was libelous upon its face, because it charged the plaintiff with a want of professional ability and integrity and thus endangered the gain derived from his vocation. (*Cruikshank v. Gordon*, 118 N. Y. 178; *Mattice v. Wilcox*, 147 N. Y. 624; Flood on Libel & Slander, 114.) Referring to him as a physician, it called him a blockhead or fool, and appealed to all the Poles in Buffalo not to intrust themselves or their families to his professional care, when he so hated them that he would not help them if he could. The words used had a direct relation to his business and assailed him in his capacity as a physician. They touched his profession, because they held him out as unworthy of employment and appealed to his old patients to no longer employ him. Calling a physician, as such, a blockhead or fool necessarily reflects upon his ability to practice medicine, and speaking of him as so influenced by hatred toward his patients that he would not heal them, necessarily reflects upon his integrity as a physician. "To impute duncehood or want of scholarship to a member of either of the learned professions touches his profession."

(Cooke's Law of Defamation, 18; *Peard v. Jones*, Cro. Car. 382.) The reflection was not simply upon the character of the plaintiff as a man, but upon his character as a physician, for it imputed a want of those qualifications which attract patronage and are essential to the calling. It tended to undermine him in the confidence of the community, which is the foundation of professional success. The article was actionable without proof of any damages, for the law imputes malice to the defendants and presumes that damages were sustained by the plaintiff from the bare act of publication. (*Sanderson v. Caldwell*, 45 N. Y. 398; *Van Tassel v. Capron*, 1 Den. 250; 13 Am. & Eng. Encyc. of Law, 312.)

While the plaintiff was thus entitled to recover on account of implied malice, his damages, without further proof, would be limited to such an amount as would fairly compensate him for the actual injury sustained. In order to recover punitive damages, also, it was necessary for him to furnish evidence of express malice, or malice in fact, as distinguished from malice implied. Implied malice, in an action for libel, consists in publishing, without justifiable cause, that which is injurious to the character of another. It is a presumption drawn by the law from the simple fact of publication. Express malice consists in such a publication from ill-will, or some wrongful motive, implying a willingness or intent to injure, in addition to the intent to do the unlawful act. It requires affirmative proof beyond the act of publishing, indicating ill-feeling or such want of feeling as to impute a bad motive. It does not become an issue, when the article is libelous on its face, unless punitive damages are claimed.

In order to establish express malice, the plaintiff was allowed to show, as against all the defendants, that, several years prior to the publication, the defendant Pitass had made remarks about him, expressing contempt and ill-will. There was no connection between these remarks and the other defendants, who neither heard them nor ever heard of them, so far as appears. It is undisputed that Pitass knew nothing about the article until some time after it had been published. He did

not directly or indirectly cause or consent to its publication. He was liable only because he owned the newspaper, and was responsible for the acts of his agents in publishing it. His previous statements did not cause the publication, nor have any effect upon it. Between those statements and the fact of publication there was no connection and no relation of cause and effect. They did not enter into, or become part of, or have any bearing upon, the wrong of which the plaintiff complains. As the article would have been published if they had not been made, they were immaterial, for they did not touch the wrongful act, and could not aggravat  the damages. Punitive damages, which are in excess of the actual loss, are allowed where the wrong is aggravated by evil motives in order to punish the wrongdoer for his misconduct and furnish a wholesome example. As was said by the Supreme Court of the United States in an important case, "whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief, or of criminal indifference to civil obligations." (*Phila., Wilmington & Baltimore R. R. Co. v. Quigley*, 62 U. S. 202, 213.)

Did Pitass inflict the injury upon the plaintiff maliciously, when he knew nothing about it at the time it was done, and was only liable as owner of the newspaper? Did he, "in a spirit of mischief," conceive the act done by his agent without his knowledge? Could his malicious remarks, made in 1890, leap forward and, without knowledge or action on his part, become blended with the act of his agent in 1894? Did his agent, the editor, conceive the act "in a spirit of mischief," which never entered his own mind, but existed at a remote period in the mind of another? Did the writer of the article act under the influence of words neither spoken in his presence nor communicated to him in any way?

In an action for a tort there can be no recovery of punitive damages for general malice, but only for such particular malice as existed when the tortious act was done and which had some influence in causing it to be done. As was once said by this court, "malice must be proved, not mere general ill-will, but malice in the special case set forth in the pleadings, to be inferred from it and the attending circumstances." (*Howard v. Sexton*, 4 N. Y. 157, 161.) Moreover, the malice of one defendant cannot be imputed to another without connecting proof. "If two be sued, the motive of one must not be allowed to aggravate the damages against the other. Nor should the improper motive of an agent be matter of aggravation against his principal." (Bigelow's *Odgers on Libel & Slander*, 296; *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447; *Craker v. C. & N. W. Ry. Co.*, 36 Wis. 658; *Haines v. Schultz*, 50 N. J. L. 481; *Clark v. Newsam*, 1 Ex. 131, 139; *Carmichael v. Waterford & Limerick Ry. Co.*, 13 Ir. L. R. 313; *Robertson v. Wyld*, 2 Moo. & Rob. 101.)

Neither the author nor editor was a party to the malice of the publisher, and his malice did no harm because it had no effect upon the result. While he was responsible for their acts, they were not responsible for his motives, of which they had no knowledge. He was not responsible for his motives in connection with their acts, because there was no connection. The malice proved in this case did not cause the conduct complained of. The one guilty of malice did not commit the wrong except through an agent, who knew nothing about the malicious feelings of his principal. The principal was not liable for general malice, but only for such particular malice as was connected with the publication. The agent was not liable for the general malice of his principal, of which he knew nothing, and which had no connection with the wrong done. The writer of the article was not liable for the malice of another, of which he had never heard, and which had no influence upon the wrongful act. Yet the general malice of one out of three defendants, although it had no connection with the wrong, has, as it must be presumed, entered into the

verdict of sixty-two hundred and fifty dollars against all, in violation of the rights of each.

As the malice proved neither caused nor prompted the publication of the libel, the judgment must be reversed and a new trial granted, with costs to abide the event.

PARKER, Ch. J., GRAY, BARTLETT, MARTIN, CULLEN and WERNER, JJ., concur.

Judgment reversed, etc.

THE BUFFALO GERMAN INSURANCE COMPANY, Appellant, v.
THIRD NATIONAL BANK OF BUFFALO, Respondent.

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1. NATIONAL BANK — NOT ENTITLED TO AN EQUITABLE LIEN UPON ITS OWN SHARES, TRANSFERRED BY ITS DEBTOR TO A BONA FIDE PURCHASER. A national bank, incorporated under the National Banking Act of 1864 (18 U. S. Statutes at Large, 110), is not entitled, as against a *bona fide* purchaser, to an equitable lien upon its shares of capital stock for a debt which the stockholder had previously incurred to the bank, although a notice printed upon their face, based upon a by-law of the bank, prohibited any transfer without the consent of the directors, by any stockholder liable to the bank as a debtor, and declared such liability to be a lien upon the stock, inasmuch as the act prohibits loans by the bank upon the security of its own shares, and thus renders any by-law in contravention thereof, or any statement based thereon, inoperative.

2. DISTINCTION BETWEEN EXECUTED AND EXECUTORY CONTRACTS. Whatever force may have been given, in the case of executed contracts, to the doctrine that only the government can, by charter proceedings, question a transaction between a national bank and its debtor, violative of the provisions of the Banking Act, that doctrine can have no force in a case where such a bank is seeking to create, as against a third person who is a *bona fide* purchaser of its shares, a lien based upon an implied executory contract, and in face of a statutory provision that the bank shall not have such a lien or take such a security.

3. NOTICE TO PURCHASER — NOT INFERRABLE FROM UNAUTHORIZED BY-LAW PRINTED ON THE FACE OF THE SHARES. The fact, that such an unauthorized by-law is printed on the face of the shares, cannot be notice to a *bona fide* purchaser of them that his purchase will be subject to a lien upon the part of the bank for the indebtedness of the stockholder to it.

Buffalo German Ins. Co. v. Third Nat. Bank, 29 App. Div. 187, reversed.

(Argued January 30, 1900; decided February 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 16, 1898, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at an Equity Term.

This action was brought to obtain a judgment directing the defendant to transfer upon its books to the plaintiff four hundred and fifty shares of its capital stock. All of these shares stood in the name of Emanuel Levi, who had, some years previously, pledged the same with, and delivered the certificates thereof to, the plaintiff to secure the payment of his promissory notes for moneys loaned. At the time that he so pledged the shares of stock, he executed and delivered to it an assignment of the same in the usual form; by which he assigned and transferred to it, by name, the shares of defendant's capital stock standing in his name on the books and constituted one of the officers of the plaintiff his attorney to effect the transfer thereof, etc. He, at the same time, executed and delivered to the plaintiff a receipt for the moneys loaned to him, which stated the rate of interest the loan should carry, the assignment of collateral security for its payment and that the plaintiff was authorized, in case of default in payment of the principal and interest of the loan, to sell the securities at public or private sale, etc.

Levi having died, a demand was made upon his executors for payment of the notes, with notice that, in the event the same were not paid and the stock redeemed, on or before a certain date, the stock would be sold at public auction and the proceeds applied in liquidation of the indebtedness of their testator. On June 30th, 1896, a public sale was regularly had, at which the stock was purchased by the plaintiff. Thereafter, a demand of the plaintiff upon the defendant to transfer the stock so purchased upon its books was refused.

The defendant claims a lien upon the stock by force of a statement printed upon the face of the certificates, in the following language: "This is to certify that Emanuel Levi is the owner of ——— shares of one hundred dollars each of

the capital stock of the Third National Bank of Buffalo, subject to the lien referred to in section 15 of the by-laws of said bank in the following words: 'No transfer of the stock of this association shall be made without the consent of the Board of Directors by any stockholder who shall be liable to the association, either as principal debtor or otherwise, which liability shall be a lien upon the said stock and all profits thereof and dividends.' And that the said stock is transferable only upon the books of the bank by him or his attorney on the surrender and cancellation of this certificate and compliance with said by-law."

Levi had been a director of the defendant and, at the time he pledged his stock to the plaintiff, he was under an indebtedness to the defendant. The trial judge made this finding with respect to it: "That at the time of the sale of the stock in question to, and its purchase by, the plaintiff, the estate of Emanuel Levi was largely indebted to the defendant, and the defendant then had and now has a right to a lien upon said certificates and stock as security for the payment thereof; that Levi's indebtedness to the defendant accrued prior to the pledge of any of said certificates to the plaintiff; that no tender or offer to pay said indebtedness by the plaintiff, or by any other person or party has ever been made. That the plaintiff was notified of the defendant's claim before the sale of June 30, 1896, and the defendant forbade such sale except subject to the defendant's claims, demands and liens."

The defendant at no time had possession of Levi's certificates of stock, and its claim is of an equitable lien upon the same for all the indebtedness owing by him as its stockholder, by reason of the statement upon the certificates. It is, also, claimed that he orally stated to the defendant's president that "he had a large amount of stock in the bank and that was security for his loans" and that, though "it was in the safe deposit vault," the bank "could consider it there as delivered as collateral to its loan." The trial court made no finding as to these facts; nor otherwise upon the subject than the finding above given. The conclusion reached by the trial court

upon the facts was, in substance, that the defendant had a lien upon the stock, for the amount of the indebtedness existing against the estate of Levi, when the certificates were purchased by the plaintiff, and that the latter's right to a transfer to itself of the stock was subject to the lien of the former.

Judgment was entered dismissing the complaint upon the merits, upon the sole ground that the plaintiff is entitled to a transfer of the stock in question by the defendant and to have new certificates issued to it in place of those to be surrendered and canceled, when, but not until, it should pay to the defendant an amount sufficient to satisfy its lien for the indebtedness to it owing by Levi's estate. This judgment was affirmed in the Appellate Division by a divided court and the plaintiff has appealed to this court.

Arthur W. Hickman for appellant. Defendant had no lien, actual or constructive, on stock of Levi held by plaintiff. Defendant had no authority to make a by-law such as purports to be set out in its stock certificates. Said by-law was unauthorized and void, and created no lien on the stock. (13 U. S. Stat. at Large, 118; *Bank v. Lanier*, 11 Wall. 369; *Bulard v. E. Nat. Bank*, 18 Wall. 589; *S. Nat. Bank v. Bank of N. Y.*, 10 Bush, 367; *Conklin v. S. Nat. Bank*, 45 N. Y. 655; *Driscoll v. W. B. & C. M. Co.*, 59 N. Y. 96; *Fleckheimer v. N. E. Bank*, 79 Va. 80.) The defendant had no actual pledge of the stock in suit as collateral for any indebtedness which Levi might have owed it. It never had possession of the stock in question. (*Cortelyu v. Lansing*, 2 Caines' Cas. 200, 202; *Garlick v. James*, 12 Johns. 146; *Wilson v. Little*, 2 N. Y. 443; 18 Am. & Eng. Ency. of Law, 595, 598; *Black v. Bogart*, 65 N. Y. 601; *McComber v. Parker*, 14 Pick. 497; *F. Nat. Bank v. N. E. Bank*, 92 U. S. 122.) If the defendant ever had any lien upon the stock in question, either actual or constructive, it waived that lien by a failure to enforce it. (*Barrett v. Goddard*, 3 Mason, 107; *Gilman v. Brown*, 1 Mason, 191; 4 Wheat. 255.) The defendant has failed to show that there was any indebtedness due from Levi

to it for which it could claim a lien. (*Austin v. Munro*, 47 N. Y. 360.)

Adelbert Moot for respondent. As the defendant secured an equitable lien upon the stock in question before the plaintiff secured a lien thereon, the lien of the defendant is prior in time and prior in right, and the plaintiff having taken the stock of the defendant with notice of the defendant's rights therein, it follows that the plaintiff acquired its lien subject to the lien of the defendant, and the plaintiff cannot compel the defendant to transfer the stock upon its books until the plaintiff has redeemed the stock from the lien of the defendant thereon. (*Crocker v. Whitney*, 71 N. Y. 161; *Nat. Bank v. Whitney*, 103 U. S. 99; *Thompson v. St. Nicholas Bank*, 146 U. S. 240; *Nat. Bank v. Matthews*, 98 U. S. 621; *Nat. Bank of Xenia v. Stewart*, 107 U. S. 676; *Conklin v. St. Nat. Bank*, 45 N. Y. 655; *Driscoll v. W. B. & C. M. Co.*, 59 N. Y. 96.) This case does not turn upon the question of whether the defendant has a perfect legal lien upon the stock as a bailee, but it is enough that the defendant has an equitable lien thereon, which the court can require the plaintiff to satisfy as a condition of requiring the defendant to transfer the stock to the plaintiff, and the by-law recited in the stock and assented to by Levi by acceptance of the stock, and Sweet's testimony as to talks had with Levi when the loans were made, prove this equitable lien on the stock. (1 Greenl. on Ev. [14th ed.] § 23.) The by-law of the defendant, made a part of its stock certificate, is not void and is not repugnant to the statute, but it is part of the very stock and contract with Levi, of which plaintiff claims the benefit as the privy and assignee of Levi, hence the plaintiff is a party thereto and is stopped from claiming it does not bind plaintiff as a part of such contract and collateral. (3 Pom. Eq. Juris. §§ 1233, 1234; 1 Pom. Eq. Juris. §§ 165, 172; U. S. R. S. § 5201; 1 Greenl. on Ev. [14th ed.] § 23.) No judgment can be rendered against the defendant in this action, because the Levi estate is interested as the principal debtor, and the failure to

make it a party defendant herein is fatal to any judgment the plaintiff can recover in this action. (Code Civ. Pro. § 452; *Osterhoudt v. Bd. Suprs.*, 98 N. Y. 239.)

GRAY, J. The decision of the question in this case turns upon provisions of the National Banking Act, passed by Congress in 1864, and the construction which they should receive, in the light of opinions of the Supreme Court of the United States. The original act for the incorporation of national banks, which was passed in 1863, contained, in section 36, the provision that the capital stock "shall be assignable on the books of the association in such manner as its by-laws shall prescribe, but no shareholder in any association under this act shall have power to sell or transfer any share held in his own right so long as he shall be liable, either as principal debtor, surety or otherwise, to the association for any debt which shall have become due and remain unpaid * * * ; and no stock shall be transferred without the consent of a majority of the directors while the holder thereof is thus indebted to the association." In 1864, the act of 1863 was repealed by a new enactment as to national banking associations, whereby it was provided, in section 35, "that no association shall make any loan or discount on the security of the shares of its own capital stock, nor be purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith," etc. (13 U. S. Stat. at Large, 110.) The act of 1864 did not re-enact any of the provisions which were contained in section 36 of the act of 1863 and the section, therefore, was expressly repealed. (*Bullard v. Bank*, 18 Wall. at p. 594.)

The defendant was organized under the act of 1864 and there was, not only, no authority in the act for the by-law referred to, and embodied in the language of the certificates of stock, but such a by-law would be inconsistent therewith. (*Bullard v. Bank*, *supra*.) The restrictions imposed by section 36 of the act of 1863 upon the shareholders had been

removed and banking associations were prohibited from permitting any indebtedness on the part of their stockholders upon the security of the shares of their own capital stock. It would seem, therefore, that a by-law seeking to impose restrictions upon transfers of stock, by declaring a lien upon the stock to the extent of any liability of the stockholder to the bank, would be quite inoperative to accomplish such a purpose and, equally so, any statement upon the certificate of stock based upon the existence of such a by-law. The bank being prohibited from loaning moneys upon the security of its own shares of capital stock, it is difficult to understand upon what legal principle it could claim the right to an equitable lien. The Appellate Division, in an opinion which was concurred in by the majority of the justices of that court, thought that, as the question was one which arose under a Federal law, it should be governed in its determination by the decisions of the Supreme Federal Court and that the more recent ones had established a controlling doctrine that a contract made in contravention of any provision of the National Banking Act is not, in the absence of any declaration to that effect, void, or incapable of enforcement. Under the authority of certain cases in the United States Supreme Court, which are considered in the opinion, it was pointed out that the validity of certain transactions by national banks with their debtors was held to be a question only for the government to raise and that the effect of their violation of the statute was not to invalidate the transaction itself, but to subject them to charter proceedings on the part of the government. (*Bank v. Matthews*, 98 U. S. 621; *Bank v. Whitney*, 103 ib. 99; *Thompson v. Bank*, 146 ib. 240.) Hence, it was deemed to follow that, in the present case, the bank's claim to be entitled to an equitable lien, though against a purchaser for value and in good faith of its shares in the market, must be allowed and any offense against the Banking Act involved must be left to governmental cognizance. I believe this conclusion to be fallacious and that the reasoning of the learned justices below is without regard to the

distinction which exists between those cases, in their facts and in the principle underlying their decision, and the earlier cases which construed the National Banking Acts and declared the doctrine that loans by banking associations to their stockholders do not give a lien to the bank upon their stock. (*Bank v. Lanier*, 11 Wall. 369; *Bullard v. Bank*, *supra*.) I am quite unable to agree in the view that these earlier cases have been overruled, or their doctrine refused credit, by the later cases which are relied upon for the defendant. If we assume the existence of a contract between the defendant bank and Levi, (and all we know of it is the testimony of the president of the defendant as to a conversation with Levi, in which he said the bank could consider the stock in his safe as collateral for his loans), it was executory in its nature as long as the stock remained in his possession and until it was in fact pledged to the bank by a delivery. Possession is of the essence of a pledge, in order to raise a privilege against third persons. (*Casey v. Cavaroc*, 96 U. S. 467; *Wilson v. Little*, 2 N. Y. 443.)

The defendant is asking the court to declare an equitable lien in its favor upon the shares of stock against a third person and, in that respect, the case is unlike those cases where the Federal court has held that a national bank might enforce a security which it had taken and held, notwithstanding the claim of the borrower that the transaction was in violation of some express provision of the law. The defendant never had possession of the stock and being under the prohibition of the Banking Act as to a transaction of a loan upon the security of its own shares of stock, it is compelled to take the position that, having dealt with Levi upon the faith that his ownership of the stock would be an added security for the performance of his promise to pay his loans and the certificates of stock carrying notice to persons dealing with Levi with respect to them that any transfer thereof would be subject to a lien in favor of the bank for any liability of the stockholder, it should be allowed an equitable lien thereon, superior to any right of the plaintiff thereto.

I should say that there was a marked difference between any such claim of the bank, which slights a provision of the Banking Law, intended to negative the right to a lien and to confer the valuable character of transferability upon national bank shares, in the public interests, and a claim which a borrower, or his representative, asserts against the right of a national bank, as his creditor, to realize its debt upon securities which have been held by it in pledge, though not within the class of those it was authorized to hold. The demand of the bank is to have the court declare an equitable lien upon its outstanding stock, by virtue of a by-law and of notice thereof on the certificates, when the Banking Act prohibited loans by it upon the security of its own shares and thereby rendered any by-law in contravention of the act, or any notice based thereon, wholly inoperative.

In *Bank v. Lanier*, (*supra*), the certificate of stock declared that the shares were transferable on the books of the bank *only on surrender of the certificates*. This limitation was imposed by the by-laws; which, further, provided that the stock of the bank should be assignable, subject to the provisions and restrictions of the 36th section of the act of 1863. Lanier and Handy purchased the stock of Culver, to whom it had been issued, and, their request for a transfer being refused, an action was brought against the bank to obtain pecuniary satisfaction. The bank defended upon the ground that it had a lien upon the stock for Culver's indebtedness to it, by virtue of the provisions of the 36th section of the act of 1863; which remained in operation, notwithstanding its repeal in 1864, by means of a by-law, adopted while the section was in force, declaring that the stock should be transferable subject to the provisions and restrictions of the act of Congress aforesaid. It appeared that the bank had sold and transferred the Culver shares upon its books to a third person and had applied the proceeds of the sale upon the indebtedness, before Culver assigned the certificates to Lanier and Handy. It was held that the provisions of the act of 1864 governed the conduct of banking associations, whether they were organized before

or after it became a law, and that the prohibition upon the making of loans on the security of the shares of their own capital stock applied. The object of the new act was stated to be, to make national banks subserve public purposes and to place shareholders, in their pecuniary dealings with the bank, on the same footing with other customers. It was a change in the policy of the government and as the restrictions of the act of 1863 fell, "so did that part of the bank's by-law relating to the subject fall with them." The judgment against the bank was affirmed.

In *Bullard v. The Bank*, (*supra*), the defendant was organized under the National Banking Act of 1864, and issued to one Clapp certain shares of its capital stock. He borrowed moneys from the bank on his notes and subsequently was adjudged a bankrupt. The plaintiff, as his trustee in bankruptcy, demanded a transfer of the stock to him as part of the bankrupt's assets; but the bank refused, claiming a lien upon it by force of its by-law, to the extent of the notes held by it. The action was then brought against the bank for refusing to allow the transfer asked for and the questions certified for determination were, whether a national bank could acquire a valid lien upon the shares of its stockholders by its articles, or by-laws, and whether the bank was entitled to hold the interest of Clapp in the stock by way of lien, or security, for all, or any of the notes. It was held, on the authority of the *Lanier Case* (*supra*), that these questions must be answered in the negative. Mr. Justice STRONG, who delivered the opinion of the court, observed that the repeal of the 36th section of the act of 1863 by the substituted act of 1864 "was a manifestation of a purpose to withhold from banking associations a lien upon the stock of their debtors;" and that a by-law founded upon the 36th section of the act of 1863 was "a regulation inconsistent with the new Currency Act, the policy of which was to permit no liens in favor of a bank upon the stock of its debtors." It was there argued for the bank that, though the act of Congress does not itself create a lien on a debtor's stock, (as did the act of 1863), it does by its fifth sec-

tion authorize the creation of such a lien by the articles of association, and by by-laws made under them. But it was answered that the words of the fifth section would bear no such meaning and that a by-law giving to the bank a lien upon its stock, as against indebted stockholders, ought not to be considered as one of those regulations of the business of the bank, or for the conduct of its affairs, which it was authorized to adopt, and that Congress evidently did not understand the section as extending to the subject of stock transfers; because in another part of the statute express provision was made for them.

The doctrine of *Lanier v. The Bank* was followed in this court, in *Conklin v. Second Nat. Bank*, (45 N. Y. 655); where the stock certificates contained the statement that the stock was not transferable "until all liabilities of the stockholder to the bank are paid." The rule of the *Lanier* case was held applicable to the transaction between the bank and the plaintiff's assignor, and it was held, against the claim of the bank to a lien upon the stock for moneys due from the stockholder, that "where the statute has prohibited all express agreements between a bank and its stockholders for a lien in favor of the former upon the stock of the latter, to secure any debts or liabilities of the stockholders to the bank, that no such lien can be created by a mere by-law of the bank is too clear to require discussion."

Do the cases which are cited and relied upon below as establishing a new doctrine apply to the present case and come to the support of the defendant's position? They are *Bank v. Matthews* (98 U. S. 621) and *Bank v. Whitney* (103 ib. 99). The National Banking Law authorizes a national banking association to loan money on personal security, and then declares that "it may purchase, hold and convey real estate for the following purposes, and no others: *First*, such as may be necessary for its immediate accommodation in the transaction of its business; *second*, such as shall be mortgaged to it in good faith by way of security for debts previously contracted; *third*, such as shall be conveyed to it in satisfac-

tion of debts previously contracted in the course of its dealings; *fourth*, such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts to it." In the case of *Bank v. Matthews*, Matthews and another person had given their joint note to a mercantile company and secured it by a deed of trust covering certain real property, executed by Matthews alone. Subsequently, the company assigned the note and deed of trust to the defendant bank to secure a loan made at the time. The loan was not paid and the bank directed the trustee to sell. In the state courts Matthews obtained a perpetual injunction against the sale, upon the ground that the loan was made upon real estate security, which was forbidden by the statute, and the deed of trust was, therefore, void. The case was taken by writ of error to the United States Supreme Court, where the decree of the state court was reversed and the cause remanded, with direction to the court below to dismiss the bill. It was held that the prohibitory clause of the National Banking Law did not vitiate real estate securities taken for loans, and that a disregard of the law only laid the association open to proceedings by the government. Justice SWAYNE remarked that "The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other, contemplated by congress." The guiding principle of the decision, however, was that it would be inequitable that a borrower should be rewarded, by giving success to his defense of the invalidity of the bank's act in taking a prohibited security for its loan, and that, as a punishment was prescribed for the violation of its charter, it was for the government to object. (See p. 629.)

In *Bank v. Whitney*, Whitney had executed a mortgage to the bank, which declared that it was made as collateral security for the payment of all notes which the bank held at the time against him and for his other indebtedness then due, or thereafter to become due. The question for determination was stated to be whether the mortgage was valid, so far as it applied to future advances to him. The question was regarded

as determined by the decision in *Bank v. Matthews*, which was reviewed in the opinion. It was observed that, "whatever objection there may be to it, as security for such advances, from the prohibitory provisions of the statute, the objection can only be urged by the government." In both these cases, the bank held the trust deed, or mortgage, and was endeavoring to enforce the security which it actually had taken from its debtor.

In *Bank v. Stewart*, (107 U. S. 676), the bank had taken, as security for a debt due from the stockholder, thirty shares of its own stock and, upon default in payment, *had sold the same and applied the proceeds in payment of the debt*. The action was brought to recover back the proceeds of sale, upon the ground that the bank had no right to take the security. The right to recover was denied, upon the ground that "the contract had been executed, the security sold and the proceeds applied to the payment of the debt," and that "both bank and borrower are in such case equally the objects of legal censure and they will be left by the courts where they have placed themselves." By suing for the proceeds of the sale, it was observed, the plaintiffs had affirmed the sale and the moneys loaned were an offset to the proceeds.

In *Thompson v. Bank*, (146 U. S. 240), the question arose upon the overcertification of a check, in violation of the United States statute; which made it "unlawful for any officer, etc., of any national bank to certify any check drawn upon said bank, unless the person or company drawing said check shall have on deposit in said bank, at the time such check is certified, an amount of money equal to the amount specified in such check." The statute, further, provided that any check so certified shall be a good and valid obligation against said bank; but that any officer, etc., violating the provisions of the act would subject the bank to proceedings on the part of the comptroller for the appointment of a receiver to wind up the affairs of the association. (13 Stat. 114, c. 106). The action was brought to recover the possession of certain railroad bonds, which the bank was charged with hav-

ing become illegally possessed of. The bank answered that the bonds had been pledged to it as collateral security for call loans, or advances, and that, the pledgors having failed to pay their indebtedness, *the bonds had been sold under an agreement* permitting the bank to do so upon the pledgor's default. The question was, whether, inasmuch as the defendant had certified checks without having on deposit an equivalent amount of money to meet them, it became a *bona fide* holder of the bonds. Upon the authority of the cases of *Bank v. Matthews* and *Bank v. Whitney*, it was held that "where the provisions of the National Banking Act prohibit certain acts by banks, or their officers, without imposing any penalty or forfeiture applicable to particular transactions *which have been executed*, their validity can be questioned only by the United States, and not by private parties." This clause from the opinion is quoted below in the present case, but I fail to perceive its precise applicability. The transaction, as in *Bank v. Stewart*, had been executed. *Matthews v. Bank* and *Bank v. Whitney*, only, of these cases, might be claimed to have a bearing upon the discussion; but their analogy is not apparent. I do not think that the United States Supreme Court intended to announce any new rule; for they simply applied a doctrine established as early as in the case of *Fleckner v. Bank*, (8 Wheaton, 339). That the *Matthews* and *Whitney* cases have not overruled the doctrine of the *Lanier* and *Bullard* cases, or of the *Conklin* case in this court, with respect to the enforceability of such a by-law as the bank had in this case, is the general understanding of text writers and it has been so understood by courts. (Cook on Stockholders [3d ed.], sec. 533; Jones on Liens [2d ed.], § 384; Thompson's Commentary on the Law of Corporations [ed. of 1894], § 2319; Paine's Banking Laws, p. 533; American & English Enc. of Law, vol. 16, p. 201, §§ 14, 15; *Evansville National Bank v. Metropolitan National Bank*, 2 Bissell. 527; *Continental Bank v. Eliot Bank*, 7 Fed. Rep. 376; *New Orleans National Banking Assn. v. Wilts*, 10 Fed. Rep. 330; *Feckheimer v. Nat. Ex. Bank of Norfolk*, 79 Va. 80.)

I do not understand that, by virtue of any rule established in the *Matthews* and *Whitney* cases, a national banking association is enabled, by force of a by-law, or by a notice upon certificates, to restrict the transferability of its stock by imposing a lien thereon for any liability owing to it by its stockholder. How can it reserve to itself a right to a lien upon shares of its own stock, in contravention of the provisions of the National Banking Act, and become entitled to demand of the courts to enforce it as against a purchaser of the shares, whose title thereto is acquired *bona fide* and for value? If the defendant bank can successfully insist upon the right to an equitable lien, which the courts must enforce, in the face of the statutory prohibition, then I do not see that certificates of capital stock in national banking associations will possess that marketable character, which has been considered to give them a greater value as investments. The transferability of the stock is one of the most valuable franchises conferred by Congress upon banking associations, as it was said by Mr. Justice DAVIS in the *Lanier* case. The learned judge further remarked, in that case: "It is no less the interest of the shareholder, than the public, that the certificate representing his stock should be in a form to secure public confidence, for without this he could not negotiate it to any advantage." Nor can it be said that this plaintiff, when offered by Levi the certificates of stock as collateral security for a loan of money, was chargeable with notice of any lien of the bank thereon. The certificates were in his possession, and were delivered to the plaintiff, and the printed matter thereon was of no importance; inasmuch as the public law, under which the bank was organized, prohibited it from making any loan or discount on the security of the shares of its own capital stock. The plaintiff could not be bound by notice of something which the law prohibited.

The plaintiff, in the language of Justice DAVIS in the *Lanier* case, was "told, under the seal of the corporation, that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation, in person or by attor-

ney, when the certificates are surrendered, but not otherwise. This is a notification to all persons interested to know, that whoever in good faith buys the stock, and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred to him. And the notification goes further, for it assures the holder that the corporation will not transfer the stock to any one not in possession of the certificates."

If the case had been one where the bank, not regarding the prohibition of the Banking Act, had taken from Levi his certificates of stock, as collateral security for the payment of any indebtedness which he had incurred, or might incur, and had realized upon them for application upon his debt, it might well be that it would not lie in his mouth, or any one claiming under him, to assert the illegality of the transaction. The case would then resemble more the cases of *Bank v. Matthews* or *Bank v. Stewart*. If the bank had violated the law, it laid itself open to proceedings on the part of the government and the courts might leave the parties where they were, and might decline to interfere to benefit the borrower to the prejudice of the stockholders and creditors.

There is no conflict between the *Lanier* and *Bullard* cases and the *Matthews* and *Whitney* cases. Each class is distinct and its doctrine is controlling where the principle involved is the same. It is one thing if the contract has been executed and to avoid it would be to deplete the assets of the bank to the amount represented by the contract; it is quite another thing, where the bank is seeking to create a lien upon an implied executory contract, or a security where it has none, and where it admits it has none, in the face of the statute, which provides that it shall not have such a lien, or take such a security.

The conclusion I reach is that the cases relied upon in the court below, in the decision of this case, do not control it. They do not authorize the assertion of an equitable lien by the bank upon the shares of its own capital stock and the plaintiff; having acquired the certificates from Levi, the stock-

holder, for value and in good faith, was entitled to have the same absolutely transferred into its name upon the books of the corporation.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

PARKER, Ch. J., BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ., concur.

Judgment reversed, *et c.*

LEONARD HOWARTH, as Receiver of the TRADERS' BANK OF TACOMA, Respondent, *v.* CHARLES E. ANGLE, Appellant.

162	179
d168	*481
162	179
171	*502

1. FOREIGN RECEIVER OF NON-RESIDENT BANK—HIS RIGHT TO ENFORCE STATUTORY LIABILITY OF RESIDENT STOCKHOLDER FOR THE BANK'S DEBTS. Where the receiver of an insolvent bank of another state, who is also a *quasi* assignee invested with all rights possessed by its creditors and entitled to bring any action involving its property, funds and effects in his hands, these including as an asset the right to enforce a several liability for its debts imposed by a foreign statute upon its stockholders in favor of its creditors, after having had that liability determined as to all the stockholders in a proceeding taken in a foreign court, brings an action in the courts of this state to enforce it against a resident stockholder, who had not been a party to the foreign proceeding, and he has had opportunity here to contest all the essential facts and his exact liability has been here determined on common-law evidence, the Court of Appeals will, in the interests of interstate comity and because the foreign statute prescribed no remedy for the enforcement of the liability, affirm a recovery here by the receiver where the same does not involve any departure from our practice, nor result in injustice to any of our citizens, or conflict with our public policy.

2. BASIS OF LIABILITY OF RESIDENT STOCKHOLDER IN FOREIGN CORPORATION. The enforcement of a statutory liability against a resident stockholder for debts of an insolvent foreign corporation does not rest upon the theory that the laws of the foreign state are in force in this state, but upon the contractual obligation he assumes to meet the liability affixed by the statute to the ownership of stock.

Howarth v. Angle, 89 App. Div. 151, affirmed.

(Argued January 18, 1900; decided February 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered

March 23, 1899, affirming a judgment in favor of plaintiff entered upon a decision of the court after trial without a jury.

This action was brought by the plaintiff, as receiver of an insolvent bank in the state of Washington, to recover the equal and ratable proportion of an alleged deficiency claimed to be due from the defendant on account of his ownership of sixty-five shares of the capital stock of said bank. Upon the trial the following facts, among others, were found by the court:

The bank in question, incorporated under the laws of the territory (now state) of Washington, became insolvent in May, 1894, and, on the 19th of that month, the plaintiff was duly appointed receiver thereof, "and of all its property and assets, real and personal, of whatsoever nature," by a court of general jurisdiction in that state, but the defendant was not a party to the action. The bank had a capital of \$500,000, divided into 5,000 shares of the par value of \$100 each, and prior to the appointment of the plaintiff as receiver, as well as ever since, the defendant owned sixty-five shares. From the organization of said bank the statutes of Washington have provided that the stockholders of every bank incorporated thereunder "should be held individually responsible, equally and ratably, and not one for the other, for all the contracts, debts and engagements of the bank accruing while they remain such stockholders, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." They further provide for the appointment of a receiver by the Superior Court whenever a corporation becomes insolvent, with "power, under control of the court, to bring and defend actions, take and keep possession of property, receive rents, collect notes and generally to do such acts, respecting the property in his hands, as the court should authorize."

Said statutes have received judicial construction in the highest court of said state, which established the law "that a receiver of an insolvent corporation, appointed under and in

accordance with said laws, and under circumstances similar to those under which plaintiff was appointed receiver, as aforesaid, became and was a receiver for all of the creditors of the respective corporation or association of which he was so appointed receiver, and a *quasi* assignee, and invested with the title to all rights of action possessed by his principals, and was entitled to bring and defend, in his own name, as such receiver, any and all actions involving the property, funds and effects in his hands as receiver or concerning the persons represented by him, including the creditors of such corporations. * * * That the liability of the stockholders of a banking corporation, organized under the provisions of the laws of the said state as above quoted, was a contingent and secondary liability to be enforced after all other assets of said bank had been exhausted and was provided for the benefit of all creditors of said bank and became a part of, and added to, the funds and property of such bank in the possession of the receiver thereof, and the title to which was in said receiver as a trust fund for the purpose of satisfying the claims of such creditors; and that such trust funds, including said contingent and secondary liability of the stockholders of such bank, were all assets in the hands of such receiver and should be adjusted in receivership proceedings, and that such receiver had the right, under the direction of the court, to enforce the said contingent and secondary liabilities and every liability of whatsoever nature which the court might find necessary in order to pay the amount owing to the creditors, and that the receiver of such corporation, and not the individual creditors themselves, was and is the proper person to sue upon and enforce the said liabilities against the stockholders of such insolvent banking corporation."

The trial court further found as follows:

"*Tenth.* That at the time the defendant became the owner and holder of sixty-five shares of stock in the said bank, as aforesaid, the provisions of the laws of the State of Washington as stated above, as interpreted by the courts of that State, were in full force and became a part of the said defendant's

contract of purchase and ownership of said shares of stock, and said defendant in and by his purchase and ownership and holding of said sixty-five shares of stock of said bank as aforesaid, contracted and agreed for a valuable consideration, that he would be, and remain, individually responsible, equally and ratably with the other stockholders of said bank, for all contracts, debts and engagements of said bank accruing while he remained such stockholder to the extent of the amount of his stock therein at the par value thereof, to wit, to the amount of \$6,500 in addition to the amount invested in said shares; and that it is provided by the laws of the said State of Washington that an action to enforce said liability or any liability under the said contract and obligation is transitory and may be brought by a receiver as aforesaid in any court of general jurisdiction in any State where personal service can be made upon said stockholder.

“Eleventh. That while the said defendant remained a stockholder of said Traders' Bank of Tacoma and the owner of sixty-five shares of its stock of the par value of \$100 each as aforesaid, certain contracts, debts, engagements and obligations duly accrued against said Traders' Bank of Tacoma, upon which, after exhausting and applying the proceeds of all property and assets of said bank of whatsoever nature, there still remains due and owing the sum of \$131,670.40, and that the equal and ratable proportion of the said deficiency due from said defendant on account of the sixty-five shares of the capital stock of said bank owned by him as aforesaid, and on account of the contract and agreement entered into by him at the time of his purchase and ownership as aforesaid, and in accordance with the provisions of the statutes and laws of the State of Washington, is the sum of \$1,712.10.

“Twelfth. That prior to the commencement of this action and prior to the making of the assessment hereinafter referred to, plaintiff as receiver of the Traders' Bank of Tacoma, as aforesaid, and acting under orders of the said Superior Court of the State of Washington for the county of Pierce, had duly and regularly collected in and sold and disposed of all

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property and assets of said Traders' Bank of Tacoma, real, personal and mixed, and of whatsoever kind and nature, except the said contingent or secondary liability against the stockholders of said bank, and had distributed the money so collected and the proceeds so realized to the several creditors of the said Traders' Bank of Tacoma entitled thereto, as was duly found and ordered by the said Superior Court last above named; and that after so selling and disposing of all of the assets of said bank, and on or about the 17th day of March, 1897, upon a full report and showing to said Superior Court last above named, and upon full proof of the facts above stated and of the condition of said bank, an order and judgment of said Superior Court was duly made and entered in said cause number 11,673 by said Superior Court of the State of Washington for the county of Pierce, adjusting all the affairs of said receivership and the liabilities of the stockholders of said bank and finding and adjudging the aggregate amount of the several deficiencies upon the several contracts, debts and engagements which had accrued against said bank prior thereto to be the sum of \$131,670.40, and further ordering, directing and adjudging that plaintiff, as receiver as aforesaid, at once levy an assessment upon the several stockholders of said bank equal to twenty-six and $\frac{4}{100}$ per cent of the par value of the stock of said bank, which was by said judgment found to be an assessment sufficient and necessary to make up the full amount of said deficiency and which said judgment directed that said assessment be paid forthwith to said plaintiff as such receiver at Tacoma, Pierce county, Washington, in cash, on or before the 24th day of April, 1897, and which said judgment further ordered and directed said plaintiff, as such receiver, to forthwith give notice to and make demand upon the several stockholders of said bank for the amount of the respective assessments upon them on account of their several proportions of the capital stock of said bank, and authorized and directed him, said plaintiff, as such receiver, to proceed forthwith by suit brought in his own name as such receiver against all stockholders, if any, who refused to pay

their respective portions of such assessment, or any portion thereof, according to the said terms and demands. * * *

The receiver thereupon levied an assessment on the several stockholders of the bank, in accordance with said judgment, of twenty-six and $\frac{3}{16}$ per cent upon the par value of said stock. Before the commencement of this action he gave notice of such assessment to the defendant as one of said stockholders, and demanded payment of his proportionate amount of the assessment and deficiency, amounting to \$1,712.10.

Upon the refusal of the defendant to pay said sum, this action was brought for the recovery thereof, and the trial judge directed a judgment in favor of the plaintiff for the amount, with interest and costs. That judgment was unanimously affirmed by the Appellate Division and the defendant now comes here.

Horace McGuire for appellant. Under the rule of interstate comity the plaintiff should not be permitted to collect this assessment or enforce this liability against a citizen of this state in this action or upon the facts alleged in his complaint. (*Marshall v. Sherman*, 148 N. Y. 8; *Drinkwater v. P. M. R. Co.*, 18 Me. 35; *Leucke v. Tredway*, 45 Mo. App. 507; *F. Nat. Bank v. G. M. C. M. Co.*, 42 Minn. 327; *Lowry v. Inman*, 46 N. Y. 119; *Farnsworth v. Wood*, 91 N. Y. 308; *Hirshfeld v. Fitzgerald*, 157 N. Y. 185; *Hirshfeld v. Bopp*, 145 N. Y. 84; *Nat. Bank v. Dillingham*, 147 N. Y. 603; *Tucker v. Gilman*, 45 Hun, 193; 121 N. Y. 189.)

Porter M. French for respondent. The plaintiff, who is a statutory receiver appointed by the Superior Court of Pierce county, in the state of Washington, can maintain this action, and it is properly brought in his name. (*Wilson v. Book*, 13 Wash. 676; *Watterson v. Masterson*, 15 Wash. 511; *Hardin v. Sweeney*, 14 Wash. 129; *Booth v. Clark*, 17 How. [U. S.] 322; *Schultz v. P. Ins. Co.*, 77 Fed. Rep. 375; *Avery v. B. L. & T. Co.*, 72 Fed. Rep. 700; *Farley v. Talbee*, 55 Fed.

Rep. 892; *Sheafe v. Larimer*, 79 Fed. Rep. 921; *Howarth v. Ellwanger*, 86 Fed. Rep. 54; *H. Nat. Bank v. Ellis*, 166 Mass. 414; *Cushing v. Perot*, 175 Penn. St. 66; *Patterson v. Stewart*, 41 Minn. 84; *M. Mfg. Co. v. Langdon*, 44 Minn. 37.) The liability imposed upon the defendant as a stockholder of the Tacoma Bank by the Constitution and statutes of Washington is contractual; therefore, transitory, and can be maintained in any jurisdiction where defendant can be found. (Beach on Priv. Corp. § 148; Morawetz on Priv. Corp. [2d ed.] § 875; Cook on Stock & Stockholders [2d ed.], § 223; *Cole v. S. R. R. Co.*, 9 Wash. 487; *Hardin v. Sweeney*, 14 Wash. 129; *Wilson v. Book*, 13 Wash. 676.)

VANN, J. The appeal book contains but three exceptions, two of which relate to findings of fact, and cannot be here considered because the affirmance was unanimous. The third relates to the conclusion of law, and hence the sole question presented is whether the facts found authorize the judgment directed. None of the evidence is returned, except certain extracts from the Constitution and statutes of Washington and an abstract of the testimony of a lawyer, practicing in that state, relating to the construction placed by its highest court upon them.

The findings show that the judgment of the trial court is not founded simply upon the judgment of the Washington court appointing a receiver and the assessment made pursuant thereto, for the organization and insolvency of the Tacoma bank, the amount of the deficiency and defendant's proportion thereof, are found as independent facts, which are presumed, from the state of the record before us, to have been established by common-law evidence. The defendant's liability and the amount thereof do not depend upon the Washington judgment, the only necessary function of which, in this action, was to establish the title of the plaintiff and his right to sue.

While the plaintiff is called a receiver, the name does not

measure his power, for he represents all the creditors and stockholders of the insolvent corporation, and is authorized to maintain such actions as are necessary to recover the assets, among which is included the cause of action set forth in the complaint. He is not a mere custodian, but "a *quasi* assignee * * * invested with the title to all rights of action possessed by his principals," and entitled to bring "any and all actions involving the property, funds and effects in his hands as receiver, or concerning the persons represented by him, including the creditors of such corporation." The statutory liability of stockholders is an asset of the insolvent bank, "the title to which was in said receiver as a trust fund for the purpose of satisfying the claims of" creditors.

While a foreign receiver cannot sue in this state, as a matter of right, "still our courts uphold the title of a foreign assignee or receiver upon the principle of comity. If the title is by virtue of a voluntary conveyance or transfer, it is sustained as against all, including even domestic creditors, but if it depends on a foreign statute or judgment, it is sustained against all except domestic creditors. * * * Every remedy to gather in the assets is afforded, unless it would interfere with the policy of the state or impair the rights of its own citizens." (*Mabon v. Ongley Electric Co.*, 156 N. Y. 196, 201.) This is made very plain by the learned opinion of the Appellate Division, which leaves nothing to be said upon the subject. (*Howarth v. Angle*, 39 App. Div. 151.)

It was not necessary that all the stockholders should be before the Washington court, when the order was made appointing the plaintiff receiver and giving him authority to sue, any more than when a decree in bankruptcy is made, which binds all who are not parties the same as those who are. (*Sanger v. Upton*, 91 U. S. 56.) That judgment may be regarded as a proceeding *in rem*, binding upon all the world so far as title to the assets of the corporation is concerned, and, according to the decisions of the highest court of the state where it was made, the so-called statutory liability of stockholders is part of the assets.

The defendant took stock in the Tacoma bank subject to the burden of the law, which he impliedly agreed to bear, as he could not otherwise have become a stockholder. (*Lowry v. Inman*, 46 N. Y. 119.) That burden is an asset, vested in the receiver, and can be enforced in this state the same as a promissory note, not because the laws of Washington are in force here, but because the defendant voluntarily assented to the conditions upon which the bank was organized. As was said in the case last cited, "a personal liability of stockholders for the debts of a corporation, in virtue of the charter, is not in the nature of a penalty or forfeiture, and does not exist solely as a liability imposed by statute. It is not enforced simply as a statutory obligation, but is regarded as voluntarily assumed, by the act of becoming a stockholder. * * * It is like other obligations, assumed in the form prescribed by the laws of the place where made, and, being valid there, is enforceable everywhere. Its validity, interpretation and effect are to be determined by the *lex loci*; but the remedy is governed by the *lex fori*." While the liability is, for convenience, frequently called statutory, because the statute, which is the constitution of the bank, affixed the obligation to the ownership of stock, it is in fact contractual and springs from an implied promise. There is no substantial difference between the liability for an unpaid balance on a stock subscription, which is an express contract to take stock and pay for it (*Stoddard v. Lum*, 159 N. Y. 265), and the liability for the unpaid deficiency of assets assumed by the act of becoming a member of the corporation through the purchase of stock, from which a contract is implied to perform the statutory conditions upon which stock may be owned. (*Richmond v. Irons*, 121 U. S. 27, 55.) The fact that the former is the promise of a principal, and the latter of a surety, does not affect the question. The express promise runs to the corporation and may be enforced by it, while the implied promise runs to the creditors, and may, according to the common law of the state where it was made, be enforced for the benefit of creditors by a receiver of the corporation appointed to wind

up its affairs. The latter promise is not a part of the capital stock of the bank, but is a substitute, required by statute, for the personal liability of a partner at common law, and has the same object, which is the protection of creditors.

The stockholders, however, may controvert in our courts all the essential facts, such as insolvency, the amount of the deficiency and the like, whether they are established by the judgment appointing the receiver or not. They may require strict common-law proof as to all the facts upon which the deficiency is based, and may contest any unreasonable expenditure in the conversion of assets and the collection of accounts, including extravagant allowances to attorneys or counsel. Upon all these questions the defendant has had his day in the courts of this state, and the united action of the courts below have conclusively determined them against him.

If the statute, upon which the personal liability of the stockholders is founded, had also provided a remedy for that liability, such remedy would have been exclusive and could not have been enforced in the courts of this state. It was said in *Pollard v. Bailey* (87 U. S. 520, 527), "the liability and the remedy were created by the same statute. This being so, the remedy provided is exclusive of all others. A general liability created by a statute without a remedy may be enforced by an appropriate common-law action." The statute of Washington, however, provided no remedy, but left that subject to the courts, to be worked out according to the common law. The learned counsel for the appellant recognizes the distinction between foreign statutes, which create a liability and provide a remedy, and those which create a liability but do not provide a remedy. He admits that, according to the law of this state, in the former class only the remedy provided by the foreign statute can be pursued, while in the latter it depends upon interstate comity. He insists, however, that the procedure against resident stockholders of a foreign corporation must be in substantial accordance with the practice established in the state where the action is brought, and this is true to the extent that no departure from that practice is permitted,

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which results in injustice to the citizens of that state, or is against the public policy thereof. He relies upon the case of *Marshall v. Sherman* (148 N. Y. 9), where the action was not brought by a receiver, but by a creditor of an insolvent bank in Kansas, to recover the amount of a deposit after a receiver had been appointed in that state. The action was founded upon a local statute, which not only created the liability, but also provided a peculiar and complicated remedy unknown to our courts, and which could not be entirely enforced in this state. (*Lowry v. Inman*, 46 N. Y. 119; *Christensen v. Eno*, 106 N. Y. 97, 103.) The liability was neither contractual, in the general sense, nor penal, but the statute charged the property of the stockholder with the debts of the insolvent corporation to the extent of the stock held by him. It was the case so aptly described by Judge ALLEN in *Lowry v. Inman* (*supra*), where the intent of the legislature "was, not to create a general, personal or property liability, but to charge the property of the stockholders, and that not generally, or by the usual and ordinary process, but conditionally, and by a peculiar and unusual procedure, only available in the courts of that state, not only limiting and prescribing the security and rights of the creditor, and the obligation and liability of the stockholder, but prescribing the remedy, going with it and as a part of the right." The assets had not been marshalled or appropriated for the benefit of creditors and there was no way to determine, with any degree of accuracy, the amount of the deficiency or how much the defendant ought to pay. The action, if it had not been arrested by the demurrer interposed to the complaint, would naturally have resulted in the appropriation by one creditor, alone, of that which belonged to others equally with himself. Under these circumstances we declared that "when the courts of this state are asked to administer the statutes of Kansas, and we can see that the case is surrounded by such complications, and the circumstances are such that it cannot be done without injustice to our own citizens or that it will be impossible to do full and complete justice to all the parties in inter-

est, it is reasonable and just to decline to administer them at all."

In that case the amount of the deficiency was not ascertained in any way by a court or otherwise; the action was not brought by a receiver; the remedy sought was that provided by the foreign statute, which created the liability; that remedy could not be wholly enforced in this state, and, to the extent that it could be enforced, might result in injustice to our citizens. In this case the action is brought by a receiver, who, according to the decisions of the Washington courts, has the title to the right of action, and the amount of the deficiency has been definitely ascertained both by the courts of that state and of this. It does not appear that there is any other stockholder or any creditor in this state, or that injustice will be done to any citizen of this state by sustaining the judgment appealed from. The reasons given by the court for denying relief in *Marshall v. Sherman* are met by the facts of this case, which distinguish it in many essential respects and permit a recovery under the principles sanctioned, but not applied in that case because the necessary facts were wanting.

It is not necessary that the procedure to enforce the liability in question should be that required by statute in this state in the case of domestic corporations, as that would frequently be impossible and would withhold the right of comity altogether. Any provision of our statutes which makes the recovery of judgment against the corporation and return of execution unsatisfied essential to the maintenance of an action against a stockholder cannot ordinarily be complied with in the case of a foreign corporation, because service of process cannot be had. (L. 1890, ch. 564, § 58; *Hirshfeld v. Bopp*, 145 N. Y. 84.) However, the provision of the Stock Corporation Law, above cited, did not apply even to a domestic banking corporation on the 18th of May, 1897, when this action was commenced, because, on the day before, section 52 of the Banking Law was so amended as to require the enforcement of liability against stockholders by action in the name of the receiver. (L. 1892, ch. 689, § 52; L. 1897, ch. 441, § 1.)

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Said amendment also answers the criticism of the appellant that if the right of action was in a creditor, instead of the receiver, the defendant would have had the benefit of the Statute of Limitations. (Code Civ. Pro. § 394.)

It is sufficient if the method of procedure in our courts is such that no injustice is done to the defendant, or to any citizen of this state, and the established policy of the state is not interfered with. (*Willitts v. Waite*, 25 N. Y. 577, 585.) No injustice was done the defendant by the judgments below, because he was only required to pay his exact proportion of the deficiency, as duly ascertained by the courts of this state. The fact that the deficiency had also been ascertained by the courts in Washington and the same amount found to exist did no harm. There is no inequality, for one creditor is not paid in full, while others get less, but all are benefited equally, and no one gets more than his due. Justice is done to all and injustice to none. While only a single stockholder was made a party to the action, he was the only stockholder, so far as appears, who could be served in this state.

If some of the stockholders should prove insolvent, the defendant cannot be affected by it or his liability increased thereby. Under the Federal Banking Law, which contains the same provision as to the liability of stockholders, in the same words as the statute in question, it was held that there was no power to direct a second assessment to supply the deficit caused by the inability of the receiver to enforce payment from such stockholders as were insolvent or beyond the jurisdiction. It was also held that the effect of the words "equally and ratably and not one for another," was to make the liability several and not joint, and to protect each stockholder from liability for the default of another. It was distinctly announced "that the shareholders were not intended to be put in the relation of guarantors or sureties one for another, as to the amount which each might be required to pay," and that "the insolvency of one stockholder, or his being beyond the jurisdiction of the court, does not in any wise affect the liability of another." (*U. S. v. Knox*, 102 U.

S. 422. See, also, *Matter of the Hollister Bank*, 27 N. Y. 393; *Crease v. Babcock*, 10 Metc. 525, and *Morse on Banking*, 503.)

The defendant, therefore, cannot be made to pay more than once nor more than his share, whether others pay or not. No resident of this state is affected, except the defendant, from whom nothing is required except what he impliedly contracted to pay. The policy of the state is not contravened, for that policy requires the enforcement of the statutory liability of stockholders of insolvent corporations by an action, in the name of a receiver, to recover the proper proportion of the deficiency from each stockholder for the benefit of all the creditors. As was said in *Stoddard v. Lum* (*supra*): "The plaintiff does not come here seeking to remove assets from this state to the possible prejudice of domestic creditors, but asks that he be permitted to enforce against our own citizens the performance of contracts into which they have entered in another jurisdiction."

When an action by a foreign receiver to collect assets, under the authority of the court which appointed him, works no detriment to any citizen of this state, and is not repugnant to its policy, it would be a provincial and narrow view for our courts to refuse to extend the usual state comity. There is a close business connection between the citizens of the different states of the Union. Investments are freely made in other states by the citizens of this state, who need the aid of the courts of the jurisdiction where the investments are made. The comity which we expect to have extended to citizens of our state, we cannot, in justice, refuse to citizens of other states. State lines should not prevent justice from being done. Our courts should not close their doors to a receiver from another state, who comes here, armed with the title to a just claim against a citizen of this state and offers to establish by common-law evidence the liability of that citizen. While we should keep control of the subject, so as to see that no discrimination is practiced against our citizens, or injustice done them either as to the substance of the liability or the method

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of procedure, when the same result is attained in practically the same way as, under similar circumstances, would be attained in the case of a domestic corporation, there is no reason for withholding that aid which is now afforded by the courts of almost all enlightened countries.

The judgment should be affirmed, with costs.

PARKER, Ch. J., BARTLETT, HAIGHT, MARTIN and LONDON, JJ., concur; O'BRIEN, J., not voting.

Judgment affirmed.

MARGARET KLEINER, by her Guardian ad Litem, CHARLES KLEINER, Respondent, v. THE THIRD AVENUE RAILROAD COMPANY, Appellant.

1. NEGLIGENCE — EVIDENCE. In an action for personal injuries evidence of the omission to sound the gong upon a street car at a crossing, although not the cause of the plaintiff's injury, may be admissible as a part of the history of the transaction, as bearing upon the degree of care exercised by the defendant's employees and upon the question of contributory negligence.

2. APPEAL — EVIDENCE NOT REVIEWABLE NOTWITHSTANDING ALLOWANCE OF APPEAL FROM UNANIMOUS DECISION. The Court of Appeals cannot review the sufficiency of the evidence to sustain a verdict after a unanimous affirmance by the Appellate Division, in an action for personal injuries, notwithstanding the allowance of an appeal, but can consider only such questions of law as are raised by proper exceptions.

3. TRIAL — WHEN CHARGE DOES NOT INTERFERE WITH PROVINCE OF JURY. It is not error for the trial court to charge, in such an action, that if the jury believe that the accident happened in the manner described by the defendant's witnesses their verdict must be for the defendant, and if they believe it occurred in the manner described by the plaintiff and her witnesses, she is entitled to recover, since it leaves to the jury the determination of all the facts.

4. PLEADING AND PROOF — EVIDENCE AS TO SPECIAL DAMAGES. The averment in a complaint in an action for personal injuries that plaintiff sustained a severe nervous shock is insufficient to justify her in proving that the result of that shock was to produce heart disease, vertigo, curvature of the spine and other diseases, it not appearing that such consequences necessarily and immediately resulted from the shock, as the rule is that special damages must be specially alleged, and the reception of evidence of such resultant injuries, properly excepted to, is reversible error.

Kleiner v. Third Ave. R. R. Co., 86 App. Div. 191, reversed.

(Argued January 18, 1900; decided February 27, 1900.)

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APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 30, 1899, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Herbert R. Limburger, Henry L. Scheuerman and Henry Siegrist, Jr., for appellant. The trial court erred in allowing the admission of testimony as to whether or not a bell was sounded during the approach of the car that struck the coach. (*Pakalinsky v. N. Y. C. & H. R. R. Co.*, 82 N. Y. 424; *Wohlfahrt v. Beckert*, 92 N. Y. 490; *Daniels v. S. I. R. T. Co.*, 125 N. Y. 407; *Huber v. N. E. R. R. Co.*, 22 App. Div. 426; *Coyle v. T. A. R. R. Co.*, 18 Misc. Rep. 9; *Jager v. C. I. & B. R. R. Co.*, 84 Hun, 307; *Erben v. Lorillard*, 19 N. Y. 299; *People v. Smith*, 104 N. Y. 491; *Furst v. S. A. R. R. Co.*, 72 N. Y. 542; *Holmes v. Moffat*, 120 N. Y. 159.) The court erred in charging the jury that if they believed that the accident occurred according to the manner described by plaintiff's witnesses plaintiff was entitled to recover. (*White v. Albany Ry.*, 35 App. Div. 23; *Hamilton v. T. A. R. Co.*, 6 Misc. Rep. 382; *Morrissey v. M. E. R. Co.*, 18 App. Div. 67; *Kain v. Smith*, 89 N. Y. 384; *Dolan v. D. & H. C. Co.*, 71 N. Y. 285; *Cass v. T. A. R. Co.*, 20 App. Div. 591, 595; *Hart v. H. R. B. Co.*, 80 N. Y. 622; *S. S. Nat. Bank v. Sloan*, 135 N. Y. 371; *McGrath v. M. L. Ins. Co.*, 6 N. Y. S. R. 376; *Brady v. Cassidy*, 9 Misc. Rep. 107.) Errors in the reception of evidence respecting injuries not pleaded and in refusing to charge as requested with respect to such injuries, necessitate reversal. (*Gumb v. T. T. S. R. Co.*, 114 N. Y. 411; *Stevens v. Rodger*, 25 Hun, 54; *Uransky v. D. D., E. B. & B. R. R. Co.*, 118 N. Y. 304; *Uertz v. S. M. Co.*, 35 Hun, 116; *Squier v. Gould*, 14 Wend. 159; *Armstrong v. Percy*, 5 Wend. 535; *Neary v. Bostwick*, 2 Hilt. 514; *Vanderslice v. Newton*, 4

N. Y. 130; *Molony v. Dows*, 15 Hcw. Pr. 261; *Baldwin v. N. Y. & H. N. Co.*, 4 Daly, 314.) The court erred in refusing to charge that there was no proof that the neurasthenia was permanent. (*Reardon v. T. A. R. R. Co.*, 24 App. Div. 163; *Hayes v. T. A. R. R. Co.*, 18 Misc. Rep. 582; *Horowitz v. H. A. P. Co.*, 14 App. Div. 631; *Filer v. N. Y. C. R. R. Co.*, 49 N. Y. 42; *Griswold v. N. Y. C. & H. R. R. Co.*, 115 N. Y. 61; *Mosher v. Russell*, 44 Hun, 12; *Mitchell v. Turner*, 149 N. Y. 39.) It was error to permit Dr. Kolb to testify as to his opinion, basing it upon facts assumed to be true in addition to or in connection with the facts which he knew to be true, and which he had testified to. (*Matter of Snelling*, 136 N. Y. 515; *Reynolds v. Robinson*, 64 N. Y. 589; *McGuire v. B. H. R. R. Co.*, 30 App. Div. 227; *People v. McElvaine*, 121 N. Y. 250; *Guiterman v. L., etc., S. S. Co.*, 83 N. Y. 358; *Gregory v. N. Y., L. E. & W. R. Co.*, 28 N. Y. S. R. 726.) The court erred in the admission of evidence relative to the cause of the spinal curvature. (*Blate v. T. A. R. R. Co.*, 16 App. Div. 287; *Carpenter v. Blake*, 2 Lans. 206; *Gregory v. N. Y., L. E. & W. R. R. Co.*, 55 Hun, 303; *Barton v. Govan*, 26 N. Y. S. R. 847; *Link v. Sheldon*, 136 N. Y. 1; *Frankfort v. M. Ry. Co.*, 12 Misc. Rep. 13.) The court erred in allowing the question as to the permanency of the meningitis, and in refusing to strike out the answer thereto. (*Curtis v. R. & S. R. R. Co.*, 18 N. Y. 534; *Filer v. N. Y. C. R. R. Co.*, 49 N. Y. 42; *Strohm v. N. Y., L. E. & W. R. Co.*, 96 N. Y. 305.)

I. Newton Williams for respondent. There was no error in the charge of the court in relation to whether or not defendant was bound to sound a gong on its cars while approaching the crossing at which the accident occurred. (*Woods v. L. I. R. R. Co.*, 11 App. Div. 16; *Buhrens v. D. D., etc., R. R. Co.*, 53 Hun, 571; *Weidinger v. T. A. R. R. Co.*, 40 App. Div. 197; *Towner v. B. H. R. R. Co.*, 60 N. Y. Supp. 289; *Bresky v. T. A. R. R. Co.*, 16 App. Div.

83; *Fandel v. T. A. R. R. Co.*, 15 App. Div. 426; *Zimmerman v. T. A. R. R. Co.*, 3 App. Div. 219; *Cass v. T. A. R. R. Co.*, 20 App. Div. 591; *Hoag v. N. Y. C. & H. R. R. Co.*, 111 N. Y. 202; *Brickell v. N. Y. C. & H. R. R. Co.*, 120 N. Y. 290.) There was no error in the reception of evidence or in the judge's charge respecting plaintiff's injuries. (*Alberti v. N. Y., L. E. & W. R. R. Co.*, 118 N. Y. 78; *McClain v. B. C. R. R. Co.*, 116 N. Y. 460; *Griswold v. N. Y. C. & H. R. R. Co.*, 115 N. Y. 64; *Rexter v. Starin*, 73 N. Y. 603; *Ward v. Forrest*, 20 How. Pr. 465, 477; *Le Roy v. P. F. Ins. Co.*, 39 N. Y. 56; *Woolsey v. Trustees, etc.*, 155 N. Y. 576; *Darling v. Klock*, 33 App. Div. 270.) Appellant's contention in relation to Dr. Kolb's testimony is untenable. (*Hall v. Crouse*, 13 Hun, 562; *Cannon v. B. C. R. R. Co.*, 9 Misc. Rep. 282; *Clegg v. M. S. Ry. Co.*, 1 App. Div. 207; *Quinn v. O'Keeffe*, 9 App. Div. 68; *Connelly v. M. Ry. Co.*, 60 Hun, 495; *Turner v. City of Newburgh*, 109 N. Y. 308; *Coler v. Fall Brook C. Co.*, 87 Hun, 584.)

MARTIN, J. This action was for negligence. The plaintiff was injured on October 28, 1897, by a collision between a coach in which she was riding and one of the defendant's cars, at the crossing of Twenty-sixth street over the defendant's tracks on Third avenue. She had judgment at the Trial Term, which was unanimously affirmed by the Appellate Division in the first department. An appeal to this court has been allowed. It is claimed that the determination in this case is in conflict with the decision of the Appellate Division in the second department in the case of *Huber v. Nassau E. R. R. Co.* (22 App. Div. 426).

An examination of both cases discloses that the alleged conflict has no existence. In the *Huber* case it was held that in an action to recover damages resulting from a collision between a vehicle and an electric car, where it appeared that the owner of the vehicle was already aware of the approach of the car, the company was entitled to have the jury instructed that the

defendant was not guilty of negligence by reason of any failure to ring a gong at the point in question. In the case at bar the driver of the coach in which the plaintiff was riding testified that he had observed the approach of the car when it was at Twenty-seventh street, and again when it was at about the center of the block between Twenty-sixth and Twenty-seventh streets. After the admission of that evidence the plaintiff asked the driver and several other witnesses whether the bell on the car was sounded. This evidence was objected to as immaterial and irrelevant, as no part of the negligence charged, and upon the ground that it was not negligence as the defendant was under no obligation to ring the bell. These objections were overruled, and the defendant excepted. No other objections were interposed to this evidence. The real claim of the defendant is that the proof having disclosed that the driver was aware of the approach of the car, the omission to ring the bell or sound the gong, even if negligence, did not contribute to or cause the plaintiff's injury, and, hence, the evidence was inadmissible. It is to be observed that no such objection was made to this evidence, so that the question which the defendant seeks to raise here is not presented by any exception in the case. In this case the court expressly charged that the defendant was not bound to ring any gong at this crossing, as the law did not require it. It, however, submitted the proof as to the omission to ring the gong to the jury to be considered in connection with the other evidence in the case in determining the defendant's liability. In the case at bar the court expressly charged the proposition which was refused in the *Huber* case.

Obviously, this case does not fall within the principle applicable to the allowance of appeals to this court, established by the case of *Sciolina v. Erie Preserving Co.* (151 N. Y. 50) where one of the grounds stated for such an allowance is that there is an existing conflict in the decisions of the different Appellate Divisions. Nor does it fall within any other principle stated as a basis for allowing such an appeal. We are of the opinion that as the exception in this case does not raise the

question argued by the defendant, the judgment should not be disturbed upon that ground. The evidence of the omission to sound the gong was admissible as a part of the history of the transaction, and as bearing upon the degree of care exercised by the defendant's employees, and upon the question of the plaintiff's contributory negligence.

Before discussing the other exceptions argued it is to be observed that notwithstanding the allowance of the appeal to this court we cannot review the sufficiency of the evidence to sustain the verdict, as the decision below was unanimous. (*Reed v. McCord*, 160 N. Y. 330.)

Therefore, in the farther discussion of this case it must be assumed that the defendant was negligent; that the plaintiff was free from contributory negligence, and that she sustained the damages awarded. Only such questions of law as the defendant has raised by proper exception can be considered by this court. Although the record is replete with objections and exceptions of every variety and character, there are but few of possible validity, or that merit special consideration.

The court was first requested by the defendant to charge that if the jury believed the accident happened in the manner described by the defendant's witnesses its verdict must be for the defendant. The court so charged, and thereupon the plaintiff asked it to charge that if the jury believed that the accident occurred in the manner described by the plaintiff's witnesses, then the plaintiff is entitled to recover. To this the court responded, "I have charged that. I charge it again," and the defendant excepted. The defendant argues that this was error which requires a reversal of the judgment, and cites the case of *Dolan v. D. & H. C. Co.* (71 N. Y. 285, 290) and other similar cases to sustain that claim. In the *Dolan* case it was said that it is not strictly proper to refer to the testimony of a witness, and ask the court to charge that if the jury believe that witness, they must find in a certain way; or that a certain legal conclusion follows, because it prevents the jury from construing the evidence and determining what facts it does establish. That case and the other decisions cited are

clearly distinguishable from the case at bar. In those cases the request to charge referred to the testimony of a witness, and then the court was asked to charge that if the jury believed that witness they must find in a certain way, or that a certain legal conclusion would follow. Here, that was not the request or charge, but it was that if the jury believed the accident occurred in the manner described by her witnesses, then the plaintiff was entitled to recover, which was equivalent to charging that if the facts claimed by her were established and found by the jury she was entitled to a verdict. This involved a determination by the jury whether they would believe the evidence of the plaintiff's witnesses or that of the witnesses for the defendant wherever there was a conflict.

Moreover, in this case we have the proposition presented to the jury in a dual form, which was that if they believed that the accident occurred according to the theory and proof of the defendant, it was entitled to a verdict, but if not and they believed the accident occurred in the manner described by the plaintiff and her witnesses, then she was entitled to recover. We do not think this exception valid, or that the charge falls within the principle of the cases upon which the defendant relies.

Another and more serious question arises upon the defendant's objection and exception to the reception of evidence as to resultant injuries that were not averred in the complaint. The complaint, so far as material to this question, reads as follows: "Whereby the plaintiff received severe and painful contusions to her head and body and arms, and lacerated her scalp and whereby she sustained severe nervous shock and concussion of the brain and injured her eyesight and she was for a time rendered unconscious, and she thereby sustained permanent injuries and was injured for life, all to her damage," etc.

On the trial the plaintiff was allowed, under the defendant's objection and exception, to introduce testimony to show that her heart was affected; that the dorsal muscle on the right

and that for this reason the judgment should be reversed and a new trial ordered. We have examined the other exceptions in the case, but find none that would justify an interference with the judgment or that requires discussion.

Upon the ground already stated, the judgment must be reversed and a new trial ordered, with costs to abide the event.

BARTLETT, J. (dissenting). I think the complaint was sufficient, although its allegations were very general. There was no occasion for the defendant to be surprised at the trial, as the remedy to make definite and certain, which was not invoked, afforded ample protection.

The plaintiff, in brief, alleged contusions to her head, body and arms; laceration of scalp; nervous shock and concussion of the brain; injured eyesight; unconsciousness. She then adds that "she thereby sustained permanent injuries and was injured for life."

This general allegation rendered competent the evidence to which objection was made, and its admission was not error.

The judgment should be affirmed.

PARKER, Ch. J., O'BRIEN, HAIGHT, VANN and LANDON, JJ., concur with MARTIN, J., for reversal; BARTLETT, J., reads for affirmance.

Judgment reversed, etc.

MARY J. LEWIS, Appellant and Respondent, v. THE NEW YORK AND HARLEM RAILROAD COMPANY et al., Respondents and Appellants, Impleaded with the NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant. .

1. NEW YORK CITY — TITLE TO RAILROAD VIADUCT SITE IN PARK AVENUE — PRESUMPTION THAT OCCUPATION IS UNDER THE LEGAL TITLE. Where the owner of a tract of land in the city of New York conveyed in 1825 to the city the fee of an avenue, formerly known as Fourth, but now as Park avenue, for street purposes, reserving, however, the trees, buildings and improvements, which avenue had been mapped under chapter 115 of the Laws of 1807, by the city, as well as by

162	202
169	*278
d169	*279
169	*280
169	*284
169	*285
169	*287
169	*288
162	202
p173	*551
173	*552
o173	*553
173	*554
j173	*559
j173	564
j173	565
77	AD*453
78	AD*585
78	AD*586

the owner, and had been laid down as a street in both maps, but had no actual existence as such until 1850-1853, and he assumed in 1882 to convey by deed a strip 24 feet wide through the center of the avenue to the New York and Harlem Railroad Company during its corporate existence, exclusively for railroad purposes, with the right to slope its embankment to the full width of the avenue, which was then 100 feet, which deed was not recorded until 1885, and of which the city had no actual or constructive notice until 1850-1853, when, upon the opening of the avenue, the corporation received a nominal award for its interest in the fee; and where the corporation had been given the right by the state and city to enter the avenue and use it for the sole purpose of a railroad and lay down its tracks on the said strip under conditions expressly assented to by the company, which gave the city supreme control, contained in two resolutions passed by the common council, one before and the other after its deed from the common grantor, and the latter reciting that the land to be entered upon was owned by the city, and where the corporation had expressly covenanted that it would remove its railroad from the street whenever the city required it, and thereafter entered and successive railroad viaducts were constructed on said strip, upon which it operated and has continued to operate its trains, neither the corporation nor its lessee can assert absolute title to the site of the viaducts, under claim of title exclusive of any other right, as against an abutting owner, who in 1895 acquired a lot upon the avenue between One Hundred and Fourteenth and One Hundred and Fifteenth streets, through *meane* conveyances from the common grantor, prior to his grant to the railroad company, in an action brought by such owner to enjoin as an interference with the appurtenant easements of light, air and access, the operation of the railroad, and for damages, since, in the absence of any evidence as to character of the original entry by the corporation or the nature of its claim when or after entering, except as may be inferred from the above facts, its entry and occupation must be "deemed to have been made under and in subordination to the legal title" of the city.

2. ACTION IN EQUITY BY ABUTTING OWNER — MEASURE OF DAMAGES. Where predecessors in the title have submitted without complaint to the maintenance by a railroad corporation, in the avenue in front of them, of two successive viaducts, each of which occupied its center for more than twenty years to the exclusion of all traffic therefrom, an abutting owner, who purchased, in 1895, while a third and higher viaduct was being constructed, under which the cross streets were carried, and who did not object to it until 1897, is not entitled, when suing in equity for damages to easements of light, air and access, to recover upon the same basis as if the avenue had never been a railroad street, but may recover only the net difference, measured in money, between the effect of the old structure and that of the new, during the period that the latter was in use, after deducting the benefits to access and traffic conferred by it, together with the usual injunction to enforce payment of the damages awarded.

3. **EASEMENTS — TITLE BY PRESCRIPTION TO EXTENT OF USER.** Where two successive railroad viaducts have each stood for more than twenty years, on lands definitely devoted to street purposes, in front of the premises of an abutting owner and her predecessors in the title, and have been used by the railroads continuously, visibly and exclusively, the corporations obtain, by prescription, as against the abutting owner and without liability at law, a right to maintain a viaduct forever within the same limits and at the same height, and, to the extent of the user, an exclusive right to the easements of light, air and access.

4. **HIGHER VIADUCT ERECTED BY GOVERNMENTAL AGENCY — USE OF IT BY RAILROADS — TIME WHEN LIABILITY FOR DAMAGES BEGINS.** Such corporations cannot be charged with the damages which the easements of an abutting owner suffered from the construction itself, by a governmental agency, of a third and higher viaduct; but where they use it, although by direction of the legislature, they are liable from the commencement of and during the period of such use after action brought, for such damages as the easements suffered from the increased height of the third viaduct, deducting, however, the benefits received from the increased facility of access afforded by the viaduct to the premises and in the locality.

5. **TEMPORARY TRETTLES ENCROACHING ON AND CLOSING AVENUE — DAMAGES FOR USE OF THEM BY RAILROADS.** Where the governmental agency, in constructing the third viaduct, erected temporary trestles, which lay outside of the lines of the former viaducts and substantially closed the avenue to traffic, and the corporations used them, although directed to do so by law, they are absolutely liable, without any deduction, for the damages which the easements of the abutting owner suffered during the period of such use.

6. **ABANDONMENT OF PRESCRIPTIVE RIGHT TO MAINTAIN VIADUCT.** Where railroad corporations have a prescriptive right to maintain in an avenue, a viaduct, its removal by a governmental agency affords no evidence that the corporations intend to abandon their prescriptive right, nor is evidence of such intent afforded by the mere fact that such a viaduct was removed and a similar one immediately constructed upon the same site.

7. **NEW YORK CITY — EFFECT OF FOURTH AVENUE CONDEMNATION PROCEEDINGS IN 1850-1853.** The condemnation proceedings of 1850-1853, by which Fourth avenue, in the city of New York, was widened, created no new easements for abutting owners, so far as the original width of the avenue was concerned.

Lewis v. N. Y. & H. R. R. Co., 40 App. Div. 343, affirmed.

(Argued January 25, 1900; decided February 27, 1900.)

CROSS-APPEALS from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered

May 15, 1899, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This action was brought to recover damages resulting from the operation of the defendants' railroad in front of plaintiff's premises on Park avenue, in the city of New York, and to enjoin the future operation of said railroad.

On the first of February, 1895, the plaintiff became the owner of a lot of land on the easterly side of Park, formerly Fourth, avenue, between 114th and 115th streets, in the city of New York, twenty-five feet wide and eighty feet deep. Upon this lot there is a five-story building known as No. 1613 Park avenue, the ground floor of which is used for stores, and the other floors for apartments. She derived her title to said premises through various mesne conveyances from one Benjamin L. Benson, who is the common source of title of all the parties to the controversy. On the 19th of April, 1897, she commenced this action against the defendants for an injunction and damages on account of railroad structures erected and maintained in said avenue, which, as she alleged, interfered with access to her premises and prevented light and air from reaching the same.

In 1811 Park avenue was laid out as a street, 100 feet wide, under the name of Fourth avenue, upon a map filed by commissioners appointed pursuant to chapter 115 of the Laws of 1807, but for many years it had no existence except on paper. Said act made the map "in respect to the laying out of streets and roads within the boundaries" specified, final and conclusive, both upon the city and the landowners. It provided for the opening of any street so laid out upon the map whenever the city authorities decided to do so.

On the 19th of November, 1825, by a deed recorded December 6th of the same year, said Benson, who owned a large tract of farming land bounded by 107th and 115th streets and Third and Fourth avenues, conveyed to the city of New York the fee of Fourth avenue as laid out on said map, so far as it extended through his premises, including the portion in front of the lot now owned by the plaintiff, in trust

for street purposes, reserving the timber, trees, buildings and improvements standing thereon, and covenanting with all convenient speed to open said avenue over the lands conveyed and make it passable for "horses, carriages, cattle and foot passengers in the same manner and with the same degree of convenience as good country roads are passable." It does not appear that this covenant was ever performed by him, or that the street was actually opened until after 1850.

On the 12th of November, 1828, Benson caused a map of his tract to be filed in the register's office, upon which various lots were laid out, numbered and represented as lying on the easterly side of Fourth avenue. On the same day, by a deed recorded forthwith, he conveyed to one Watt, a predecessor in title of the plaintiff, the premises now belonging to her, with other lands, described by the lot numbers of said map and as bounded by the easterly exterior line of Fourth avenue.

The New York & Harlem Railroad Company was incorporated by chapter 263 of the Laws of 1831, and authorized "to construct a single or double railroad or way, from any point on the north bounds of Twenty-third street, to any point on the Harlem River, between the east bounds of the Third Avenue and the west bounds of the Eighth Avenue," but in case the route should be located "in or along any public street or avenue now laid out on the map or plan of the city of New York," the company was required to "leave sufficient space in the said street or avenue on each side of the said railroad for a public highway for carriages, and for a sidewalk for foot passengers." The right was reserved to alter, amend or repeal the act at any time. The location of the route was not to be effective until a map thereof was approved by the common council. That approval was given on the 19th of December, 1831, by a resolution authorizing the company to construct a double or single-track railroad, not exceeding twenty-four feet in width, along Fourth avenue from Twenty-third street to the Harlem river, with the right, however, reserved to the city, in case "the railways or any part thereof shall constitute an obstruction or impedi-

ment to the future regulation of the city, or the ordinary use of any street or avenue," of which the city was to be the sole judge, to require the company to forthwith provide a remedy for the same, and in case of its failure to do so within one month after such requisition, to require it to remove the railway and replace the street in as good condition as it was before the railway was laid down. In case the company neglected to obey, the city was given the right to remove the obstruction from the street and restore it to its former condition at the expense of the company. It was further provided that "the railroad path" should be protected by railings, and that if the railroad should be discontinued "the strip of land to be taken for the said railroad should be thrown open and become a part of the street." This resolution was embodied in a formal agreement, duly executed by the company. On the first of February, 1832, the common council, by resolution, authorized the company "to take possession of the ground owned by the common council over which the line of said railroad is ordered to be constructed, and that they be permitted to use the same" for railroad purposes only.

On the 18th of January, 1832, Benson conveyed to the company a central strip of land twenty-four feet wide, extending from 105th to 116th street, "being part of one of the avenues laid out on the map of the city of New York as the 4th avenue * * * for and during the full period of time" that it should remain a corporation, "and on which they are to construct their railroad and for no other purpose, with the power of sloping their embankments or excavations so much farther beyond the line of said premises * * * as may be necessary to support their work, not, however, extending beyond the width of the avenue," which was then one hundred feet. This deed was recorded August 18th, 1835, but prior thereto the company had constructed a double-track railroad in the center of the avenue, on a stone viaduct, about twenty-eight feet wide at the base, with sloping walls, which, in front of the premises in question, were ten or twelve feet high.

In 1835 an effort was made to widen Fourth avenue to 140 feet, mainly because of the railroad in the center thereof. After action by the common council, upon the petitions of citizens and landowners interested, it was provided by chapter 274 of the Laws of 1837, entitled "An act to alter the map or plan of the city of New York," that "Fourth Avenue" should "be continued and extended on the said map or plan from 66th street to 68th street," and that "all that part of the Fourth avenue * * * lying between 34th street and the Harlaem river shall be widened on the map or plan of the said city by adding thereto, on each side thereof, twenty feet of land, so as to make the whole width of that part of the said avenue 140 feet." The portion so to be widened was declared to be one of the avenues of the city, with the like effect as if it had been laid out under the act of 1807. Said act of 1837 discontinued parts of eight streets, and assumed that Fourth avenue was not yet opened, for it provided that "whenever the said avenues or streets, or any or either of them, shall be opened, the damage and benefit shall be estimated, assessed and paid in like manner as the same would have been done if the said avenues or streets had been originally so extended or continued."

Between 1850 and 1853 Fourth avenue was opened from 38th street to 135th, the additional twenty feet on each side having been condemned and a nominal award of one dollar made to the railroad company, but its possession of the central portion of the street was never disturbed, and the part then occupied by the company was never used as a public street until after 1892. There is no evidence that any part of the avenue in the vicinity of plaintiff's premises was ever built upon or used by teams until after 1850.

By chapter 702 of the Laws of 1872 said company was "authorized and required to regulate the grade of their railroad in the Fourth Avenue," and to make numerous changes by way of viaducts, bridges and tunnels in order to do away with grade crossings. Four tracks were authorized, and the grade was depressed a part of the way so that the tracks ran

through a cut, but in front of the premises now belonging to the plaintiff a viaduct was required, which resulted in the construction of a solid stone embankment 56 feet 4 inches wide and 3 feet high, with a wall on each side extending up 3 feet and 10 inches farther. These changes were made by a board of engineers named in the act, who were required "to execute, direct and superintend the construction of the said improvement," and "take the entire charge and control" thereof. The cost of the improvement was to be paid by the railroad company and the city in equal proportions. The city officers were forbidden to obstruct the work; the municipal legislature was required to pass such ordinances as were necessary to facilitate the same, and the company was "authorized and directed to run" its trains over the structure "when completed."

This improvement was finished about 1873, as the trial court is presumed to have found, and during that year said company leased its railroad in Fourth, now Park avenue, to the New York Central & Hudson River Railroad Company for a term of 401 years, and the latter company has operated the same ever since.

In 1890 an act of Congress required the secretary of war "to cause the low bridges now crossing said Harlem river to be replaced by other bridges at the expense of the owners thereof, as soon as the necessary legislation, if any such legislation be necessary, shall have enabled the change in grade to the approaches of said bridges thus required to be made." (26 U. S. Stat. at Large, 437.) In order to conform to this act no change of grade was required south of 125th street. In 1892 an act was passed, known as chapter 339, "to regulate, improve and enlarge Park Avenue;" "to provide for the passage of intersecting streets under the railroad structure of the New York & Harlem Railroad Company;" "for the elevation of said railroad structure;" "for changing the grade of said railroad;" "for the construction of a new railroad bridge at an increased elevation over the Harlem River. * * * and for other purposes." From the south

side of 111th street to the river the railroad tracks were required to be carried on a viaduct of iron consisting of three lines of plate girders, supported by steel columns standing on suitable pedestals of masonry, with proper foundations. The structure was to be so built that all streets from 112th to the Harlem river should be passed over with a clear height of not less than 14 feet above the surface of the pavement. Various cross streets, including those nearest to the plaintiff's property, which did not then cross the railroad, were required to be opened, regulated and paved, and to pass under the viaduct. Three supporting columns were to divide the structure into spans of about sixty-five feet, with one column in the center and another on each side at a distance not exceeding 28 feet. The columns were not to be more than 24 inches through, which was to be their "extreme external diameter above the level of the street pavement." The railroad tracks, four being authorized, were to be carried on a solid, tight, iron floor, and the drainage water conducted by pipes into sewers. Many other changes were required, during the making of which temporary structures were authorized in the avenue for the operation of the railroad. All the work, including that last named, was to be done by a board appointed by the mayor, which was directed to take the entire charge and control of the improvement, and to execute it in conformity with the act, one-half of the expense to be paid by the companies and the other half by the city, but the amount of the latter was to be assessed upon the property benefited. The defendants were "authorized and directed" to run their trains on the structure "when completed."

Pursuant to this act work was begun in August, 1894. The stone embankment was taken away and the viaduct constructed within the lines of the old structure, at a height above the street of about 35 feet and a width of 56 feet and 2 inches. The effect was to raise the trains high in the air and to remove the former obstruction from the avenue, which is now graded, paved and used as a street, 140 feet wide, with cross streets no longer cut in two. The whole avenue is open to traffic,

N. Y. Rep.]

Statement of case.

except where the columns stand, and all the lateral streets, including 114th and 115th, extend across without obstruction. While the permanent structure was in course of erection, provision was made by said board, pursuant to the act, for the running of trains by the erection of temporary trestles on each side of the old stone structure of 1872. These trestles were 3 feet high, about 13 feet 7 inches wide, and the total width of the old structure and the two trestles about 85½ feet. They were built primarily for the operation of trains, and secondarily to aid in erecting the permanent structure. All the work of construction, both temporary and permanent, was done by the board appointed by the mayor, and neither defendant participated in the erection, or did anything, except in subordination to the board, which had exclusive control. The trains were transferred to the trestles in September, 1894, and were run thereon until February 16th, 1897, when they were removed to the new steel viaduct, upon which they have been operated ever since. The new structure, as compared with the old, confers no additional advantage upon the defendants. Between four and five hundred trains run over this structure every twenty-four hours, some of them in the night time, at from twenty to twenty-five miles an hour. The plaintiff purchased her lot while the work was in progress, and commenced this action shortly after the completion thereof.

The trial judge found that the defendants, by virtue of the various acts above named, the resolutions and action of the city, the Benson deed of January 18th, 1832, the street opening proceedings "commenced in 1850 and consummated in 1853, * * * and all acts of acceptance, user and occupation on the part of the defendant railroad companies, and the lapse of time and the acquiescence of the plaintiff or her predecessors in title, acquired the right, without liability to the plaintiff, to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to August, 1894." He also found that "the rental and fee values of the plaintiff's premises were damaged by the work of constructing said permanent structure, and by the existence of the same prior to

said date (when the trains began to run thereon), but neither of the said defendants is liable for such damage. The said permanent structure and the operation of trains thereon are, and since February 16th, 1897, have been, a continuous trespass upon the plaintiff's easements of light and air, appurtenant to her said premises, and solely in consequence of said trespass, and aside from any other causes, the rental or usable value of said premises was depreciated from said date down to May 9th, 1898, in the sum of \$100, below what said rental value would have been during said period, if there had been no change in defendant's said railroad in Park avenue in front of said premises, pursuant to chapter 339 of the Laws of 1892, and the fee value of said premises had been, and was on May 9th, 1898, depreciated in the sum of \$750 below what said fee value would have been on said date if there had been no change in defendants' railroad as aforesaid. The said sums awarded as damages are over and above any and all benefits conferred upon said premises by the changes made pursuant to chapter 339 of the Laws of 1892, which said benefits result in part from improved access to said premises afforded by said changes, and in great measure offset the damages to said premises caused by said changes. The said sums awarded as damages are exclusive of any damages that would have been occasioned to plaintiff's premises by the maintenance and use of the defendants' railroad and structures, had there been no change in the same pursuant to chapter 339 of the Laws of 1892, for which last-mentioned damages, if any, the defendants are not responsible either jointly or severally." It was further found that "the existence of the temporary structure in front of plaintiff's premises, during said period, and the operation of trains thereon, deprived the plaintiff to a great extent of the light and air and access to which she was entitled, without any corresponding benefit, and the rental or usable value of her premises was damaged thereby in the sum of \$600, which sum she is entitled to recover, with interest from February 16th, 1897; but the said defendant is liable for the presence and use of said temporary

structure only during the time its trains were operated thereon."

The trial court held that the defendants were not liable for the erection, maintenance or use of the old stone structure, or for the erection of the new steel or temporary wooden structures, but that they were liable for the actual use of the temporary trestles and for the net difference in the effect of using the old and the new structures, after taking into account the increased facilities for access. The liability of the defendants was thus limited to damages caused by the presence of the temporary and permanent structures, so long only as they were in actual use by them.

From the usual judgment entered accordingly both parties appealed to the Appellate Division, where the judgment was affirmed, one of the justices dissenting upon the ground that the plaintiff had sustained no permanent damage by reason of the new erection, as the old structure was a greater detriment to her premises than the new. Both parties appealed to this court.

J. C. Bushby and *L. M. Berkeley* for plaintiff, appellant and respondent. Park avenue, in front of the premises in suit, was a public street prior to the defendants' entry into the same. (*Vail v. L. I. R. R. Co.*, 106 N. Y. 287; *Hughes v. Bingham*, 135 N. Y. 352; *Kane v. N. Y. E. R. R. Co.*, 125 N. Y. 181; *Story v. N. Y. E. R. R. Co.*, 90 N. Y. 173; *People v. Kerr*, 27 N. Y. 199; *Ten Eyck v. Whitbeck*, 156 N. Y. 352; *Foster v. B. S. Co.*, 47 Barb. 505; *Wilsey v. Dennis*, 44 Barb. 359; *Fisher v. Hall*, 41 N. Y. 423; *Gilbert v. N. A. F. Ins. Co.*, 23 Wend. 43.) The defendants are estopped to deny that Park avenue, in front of the premises in suit, was a public street at the time of their entry into the same. The deed on which the defendants rely recognizes the existence of Park avenue as a public street, and admits that the strip on which their railroad is constructed is a part of said street. (*Vil. of Olean v. Steyner*, 135 N. Y. 345; *Hennessy v. Murdock*, 137 N. Y. 317; *Lord v. Atkins*, 138

N. Y. 190; *Child v. Chappell*, 9 N. Y. 256; 20 Am. & Eng. Ency. of Law, 461; *Hardenburgh v. Lakin*, 47 N. Y. 111; *Jackson v. Parkhurst*, 9 Wend. 209; *Cobb v. Oldfield*, 151 Ill. 541; *Smith v. Young*, 160 Ill. 174; *Despain v. Wagner*, 163 Ill. 600; *Haight v. Littlefield*, 147 N. Y. 341.) The plaintiff has easements of light, air and access in Park avenue, unless those easements have been lost in some way. (*Lahr v. M. E. Ry. Co.*, 104 N. Y. 289, 290; *Abendroth v. M. Ry. Co.*, 122 N. Y. 14; *Kane v. N. Y. E. R. R. Co.*, 125 N. Y. 180.) The plaintiff's easements in Park avenue have not been lost by any acts of the legislature nor of the city of New York. (*Story v. N. Y. E. R. R. Co.*, 90 N. Y. 146; *Lahr v. M. E. Ry. Co.*, 104 N. Y. 288; *Pond v. M. E. Ry. Co.*, 112 N. Y. 188; *Shepard v. M. Ry. Co.*, 117 N. Y. 448; *Abendroth v. M. Ry. Co.*, 122 N. Y. 17; *Kane v. N. Y. E. R. R. Co.*, 125 N. Y. 176; *Matter of Mayor, etc., of N. Y.*, 99 N. Y. 577; Cooley on Const. Lim. [6th ed.] 222; *D., L. & W. R. R. Co. v. City of Buffalo*, 158 N. Y. 273; *Potter v. Collis*, 156 N. Y. 30.) The plaintiff's easements in Park avenue have not been lost by the deed from Benson to the New York and Harlem Railroad Company. (*Blackman v. Striker*, 142 N. Y. 560; *Perrin v. N. Y. C. R. R. Co.*, 36 N. Y. 120; *Bissell v. N. Y. C. R. R. Co.*, 23 N. Y. 61; *Hennessy v. Murdock*, 137 N. Y. 323; *Mott v. Mott*, 68 N. Y. 252; *Matter of Ladue*, 118 N. Y. 219; *Albert v. Thomas*, 73 Md. 181; *Kernochan v. N. Y. E. R. R. Co.*, 128 N. Y. 568; *Pappenheim v. M. E. Ry. Co.*, 128 N. Y. 437.) The plaintiff's easements in Park avenue have not been lost by reason of the fact that she purchased with notice of the existence of the defendants' railroad. (*Sterry v. N. Y. E. R. R. Co.*, 129 N. Y. 619; *Kernochan v. N. Y. E. R. R. Co.*, 128 N. Y. 568; *Pegram v. M. E. Ry. Co.*, 147 N. Y. 146; *Footte v. M. E. Ry. Co.*, 147 N. Y. 374.) The plaintiff's easements in Park avenue have not been lost by non-user or abandonment, nor by laches, acquiescence or adverse possession. (*Conabeer v. N. Y. C. & H. R. R. R. Co.*, 156 N. Y. 484; *Hughes v. M. E. Ry. Co.*, 130 N. Y. 26; *Hennessy v. Murdock*, 137 N. Y. 326; *People*

v. *Maher*, 141 N. Y. 336; *Cox v. Stokes*, 156 N. Y. 511; Code Civ. Pro. § 369; *Baker v. Oakwood*, 123 N. Y. 16; *A. B. N. Co. v. N. Y. E. R. R. Co.*, 129 N. Y. 260, 266.) The possession of the defendants in Park avenue has been under a license from the city, and, hence, not adverse. (*D., L. & W. R. R. Co. v. City of Buffalo*, 158 N. Y. 273; *Potter v. Collis*, 156 N. Y. 30; *People v. Kerr*, 27 N. Y. 211; *Milhan v. Sharp*, 27 N. Y. 622; *Trustees v. Jessup*, 10 App. Div. 458; *St. V. O. Asylum v. City of Troy*, 76 N. Y. 108; *Pierrepont v. Barnard*, 6 N. Y. 288; *White v. M. Ry. Co.*, 139 N. Y. 24, 25; *Wiseman v. Luck-singer*, 84 N. Y. 44; *Babcock v. Utter*, 1 Abb. Ct. App. Dec. 37; 1 Am. & Eng. Ency. of Law [2d ed.], 794; *H. R. T. Co. v. W. T. & Ry. Co.*, 135 N. Y. 407.) Title to a portion of a public street cannot be obtained by adverse possession. (*Burbank v. Fay*, 65 N. Y. 69; *St. V. O. Asylum v. City of Troy*, 76 N. Y. 114; *Bliss v. Johnson*, 94 N. Y. 241; *Driggs v. Phillips*, 103 N. Y. 82; *Webb v. Demopolis*, 95 Ala. 134; *Harn v. Dadeville*, 100 Ala. 199; *Hoadley v. San Francisco*, 50 Cal. 275; *Visalia v. Jacob*, 65 Cal. 434; *San Leandro v. Le Breton*, 72 Cal. 177; *Ames v. San Diego*, 100 Cal. 394.) The defendants are estopped from setting up any adverse possession in Park avenue. (*Vil. of Olean v. Steyner*, 135 N. Y. 346; *Bridges v. Wyckoff*, 67 N. Y. 130.) The defendants have not shown that they entered into the possession of Park avenue under claim of title, exclusive of any other right. (*Heller v. Cohen*, 154 N. Y. 311; *Doherty v. Matsell*, 119 N. Y. 648; Code Civ. Pro. § 368; *Thompson v. Burhans*, 79 N. Y. 99; *Bliss v. Johnson*, 94 N. Y. 242; *Wright v. S., O. & N. Y. R. R. Co.*, 92 Hun, 32; *Archibald v. N. Y. C. & H. R. R. R. Co.*, 157 N. Y. 582; *De Lancey v. Piepgras*, 138 N. Y. 46; *Stevens v. Hauser*, 39 N. Y. 302; *Jackson v. Sharp*, 9 Johns. 167.) The court will not presume a grant to the defendants of any portion of the bed of Park avenue. (*Burbank v. Fay*, 65 N. Y. 66, 67; *Donahue v. State*, 112 N. Y. 145; *K. I. Co. v. Shultz*, 116 N. Y. 388; *City of Quincy v. Jones*, 76 Ill. 242; *Mayor, etc., v. Magnon*, 4

Mart. [La.] 9; *De Lancey v. Piepgras*, 138 N. Y. 46; *Roe v. Strong*, 107 N. Y. 359.) The plaintiff's easements in Park avenue have not been lost by prescription. (*Hughes v. M. E. Ry. Co.*, 130 N. Y. 26; Jones on Easements, § 573; *Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 106; *Marvin v. B. I. M. Co.*, 55 N. Y. 559; *Rhodes v. Whitehead*, 27 Tex. 316; *Taylor v. C., etc., R. Co.*, 83 Wis. 644; *Galway v. M. E. Ry. Co.*, 128 N. Y. 143; *Thomas v. Marshfield*, 13 Pick. 248; *Schmidt v. Draper*, 137 Ind. 249; *Ulman v. C. S. A. Co.*, 83 Md. 130; *Parker v. Framingham*, 8 Metc. 268.) The construction, maintenance and operation of the defendants' railroad structures in Park avenue constitute an invasion of the plaintiff's easements. (*Williams v. B. E. R. R. Co.*, 126 N. Y. 100; *Lahr v. M. E. Ry. Co.*, 104 N. Y. 288; *Story v. N. Y. E. R. R. Co.*, 90 N. Y. 168; *Kane v. N. Y. E. R. R. Co.*, 125 N. Y. 176; *Hill v. Mayor*, 139 N. Y. 495, 505; *Garvey v. L. I. R. R. Co.*, 159 N. Y. 332; *H. R. T. Co. v. W. T. & Ry. Co.*, 135 N. Y. 407.) The defendants are responsible for the construction, maintenance and operation of all the railroad structures in Park avenue. (*Beal v. Finch*, 11 N. Y. 136; *Creed v. Hartmann*, 29 N. Y. 597; *Roberts v. Johnson*, 58 N. Y. 616; *Wehle v. Butler*, 61 N. Y. 247; *Dyett v. Hyman*, 129 N. Y. 359; *People v. Hayes*, 7 How. Pr. 248; *People v. Nostrand*, 46 N. Y. 375; *People v. Comptroller*, 20 Wend. 595; *Stewart v. Wells*, 6 Barb. 79; *Kerr v. Mount*, 28 N. Y. 665.) The trial court adopted an erroneous measure of damages. (*Sperb v. M. E. Ry. Co.*, 117 N. Y. 162; *A. B. N. Co. v. N. Y. E. R. R. Co.*, 129 N. Y. 270; *Lahr v. M. E. Ry. Co.*, 104 N. Y. 268; *Hart v. Ten Eyck*, 2 Johns. Ch. 62; *People v. Mayor, etc.*, 4 N. Y. 419.)

Henry G. Atwater and *J. C. Thomson* for Alice I. Birrell and others, intervening. The owners of property abutting on Park avenue have easements in said avenue which are taken or impaired by the construction of the viaduct of the New York and Harlem railroad pursuant to the provisions of

Laws of 1892, chapter 339. (*Taylor v. N. Y. & H. R. R. Co.*, 27 App. Div. 190; *Welde v. N. Y. & H. R. R. Co.*, 28 App. Div. 379; *Lewis v. N. Y. & H. R. R. Co.*, 40 App. Div. 343; *Birrell v. N. Y. & H. R. R. Co.*, 41 App. Div. 506; *R., H. & L. R. R. Co. v. N. Y., L. E. & W. R. R. Co.*, 110 N. Y. 128; *S. R. T. Co. v. Mayor, etc.*, 128 N. Y. 510; *P. W. W. Co. v. Bird*, 130 N. Y. 249; *People ex rel. v. Barnard*, 110 N. Y. 548; *People v. O'Brien*, 111 N. Y. 30; *H. R. T. Co. v. W. T. & Ry. Co.*, 135 N. Y. 393.)

Ira A. Place, Samuel E. Williamson and Alexander S. Lyman for defendants, respondents and appellants. By virtue of the deed from Benjamin L. Benson, and more than twenty years' adverse possession claiming title under that deed, the railroad companies have acquired the right, as against the plaintiff, to maintain and operate the permanent railroad structures erected under chapter 339 of the Laws of 1892, and the amending act. (*Conabeer v. N. Y. C. & H. R. R. Co.*, 156 N. Y. 474; *Taylor v. N. Y. & H. R. R. Co.*, 27 App. Div. 190; *Prentice v. Geiger*, 74 N. Y. 341; *A. B. N. Co. v. N. Y. E. R. R. Co.*, 129 N. Y. 252; *Birrell v. N. Y. & H. R. R. Co.*, 41 App. Div. 506; *Sanders v. N. Y. & H. R. R. Co.*, 42 App. Div. 618; *Argotsinger v. Vines*, 82 N. Y. 308; *Thompson v. Burhans*, 79 N. Y. 93; *Jackson v. Vermilyea*, 6 Cow. 678; *Dominy v. Miller*, 33 Barb. 386.) By virtue of the street opening proceedings consummated in 1853, the ownership of the bed of Park avenue acquired by the city, and the easements appurtenant to abutting property which came into existence by virtue of such proceedings, were subject not only to the right of the defendant, the New York and Harlem Railroad Company, to maintain and operate its railroad as then existing, but subject also to its right and obligation to maintain and operate within the limits of Park avenue its railroad at such grade and on such structures as might be required by subsequent lawful action of the legislature and of the city. (*Taylor v. N. Y. & H. R. R. Co.*, 27 App. Div.

195; *White v. M. Ry. Co.*, 139 N. Y. 19; *Lahr v. M. E. Ry. Co.*, 104 N. Y. 287; *Bloodgood v. M. & H. R. R. Co.*, 18 Wend. 9; *S. R. T. Co. v. Mayor, etc.*, 128 N. Y. 510; *People v. Kerr*, 27 N. Y. 188; *Mayor, etc., v. S. A. R. R. Co.*, 32 N. Y. 261; *People v. O'Brien*, 111 N. Y. 1; Mills on Em. Dom. [2d ed.] §§ 46, 47; *Matter of City of Buffalo*, 68 N. Y. 167; *People ex rel. v. N. Y. C. & H. R. R. Co.*, 156 N. Y. 570.) Any damage caused to the plaintiff's premises by the operation of trains on the temporary structure during the progress of the improvement is *damnum absque injuria*. (*Fobes v. R., W. & O. R. R. Co.*, 121 N. Y. 505; *Sperb v. M. E. Ry. Co.*, 137 N. Y. 155; *Welde v. N. Y. & H. R. R. Co.*, 28 App. Div. 379; *Atwater v. Trustees of Canandaigua*, 124 N. Y. 602; *Benner v. A. D. Co.*, 134 N. Y. 156; *Plant v. L. I. R. R. Co.*, 10 Barb. 26; *Matter of Squire*, 125 N. Y. 131; *Ricket v. M. R. Co.*, L. R. [2 E. & I. App.] 175; *Booth v. R., W. & O. T. R. R. Co.*, 140 N. Y. 267; *Hill v. Mayor, etc.*, 139 N. Y. 495.) Defendants are not liable for the acts of the board for the Park avenue improvement, and assuming that any of the acts of that board constitute as a matter of law a trespass upon the plaintiff's premises, defendants were not so connected with such acts as to be made liable therefor. (*N. Y., N. H. & H. R. R. Co. v. Baker*, N. Y. L. J., Jan. 6, 1900; *Welde v. N. Y. & H. R. R. Co.*, 28 App. Div. 379; *People ex rel. v. Civil Service Bd.*, 41 Hun, 287; *S. P. & P. Assn. v. Mayor, etc.*, 8 App. Div. 230; Dillon on Mun. Corp. [4th ed.] § 974.)

VANN, J. The plaintiff claims that the trial court erred in refusing to allow her damages for the effect of the new structures, both temporary and permanent, without considering the effect of the old structure. The defendants claim that the court erred in awarding any damages, or giving any relief whatever, to the plaintiff, because, as against her, they had the right to erect any railroad structure in the street, of any height, within the lateral lines of the old embankment.

The defendants' appeal rests mainly upon the proposition

that, by virtue of the Benson deed to the Harlem Company, in 1832, and possession thereunder for more than twenty years under claim of title exclusive of any other right, the defendants acquired title to the land upon which the steel viaduct now stands. (Code Civ. Pro. § 369; *Baker v. Oakwood*, 123 N. Y. 16.)

The situation, when the Harlem Company entered Fourth avenue and took possession of the strip of twenty-four feet covered by the Benson deed, was as follows: The section had been mapped under the act of 1807, as well as by Benson, and Fourth avenue had been laid down on both maps as one of the streets of the city. Benson had conveyed the entire avenue to the city for street purposes, reserving certain rights, and after thus conveying to the city had assumed to convey said strip to the Harlem Company exclusively for railroad purposes, but the conveyance was effective only as to his reserved rights. After conveying to the city, but before conveying to the company, he had conveyed, by reference to said maps, certain abutting lands to the plaintiff's predecessor in title. The avenue was not opened or built upon, as such, but was a street on paper only. The state and city had given the Harlem road the right to enter the avenue and lay down tracks on said strip, subject to certain drastic conditions, which gave the city supreme control, and to which the company had expressly assented, and, finally, the city had authorized the company "to take possession of the ground owned by the" former and had ordered the latter to construct its road thereon, with leave to use the street for "the purpose of a railroad and for that purpose only." The situation differs from that considered by us in a late case, as Benson had conveyed the street to the city and the abutting land to plaintiff's predecessor before he conveyed to the company, whereas in that case the first conveyance was to the company itself. (*Conabear v. N. Y. C. & H. R. R. Co.*, 156 N. Y. 474.)

There is no evidence as to the character of the original entry into the street by the Harlem Company, or the nature of its claim when or after entering, except as it may be

inferred from the facts above mentioned and the subsequent occupation and use for railroad purposes of a portion of the avenue, which was a street *in posse* only and did not become a street *in esse* until twenty years later. Under these circumstances the entry and occupation by the company must be "deemed to have been under and in subordination to the legal title" of the city. (Code Civ. Pro. § 368; Code Pro. § 81; 2 R. S. 293, § 8.) Occupation must not only be hostile in its inception, but it must continue hostile, and at all times, during the required period of twenty years, challenge the right of the true owner in order to found title by adverse possession upon it. The entry must be strictly adverse to the title of the rightful owner, for if the first possession is by permission it is presumed to so continue until the contrary appears. If the occupation begins with recognition of the real owner's estate it is presumed to be subservient, and that the one making the entry intends to hold honestly and not tortiously. The character of the possession depends on the intention with which entry is made and occupation continued. There is no *disseisin* until there is occupation with intention to claim title, and the fact of entry and the *quo animo* fix the character of the possession. The burden of proving all the facts necessary to constitute adverse possession is upon the one who asserts it, for in the absence of such proof possession is presumed to be in subordination to the true title. (*Brandt v. Ogden*, 1 Johns. 156; *Smith v. Burtis*, 6 Johns. 197; *Jackson v. Johnson*, 5 Cow. 74; *Jackson v. Brink*, 5 Cow. 483; *La Frombois v. Jackson*, 8 Cow. 589; *Humbert v. Rector, etc., of Trinity Church*, 24 Wend. 587; *St. Vincent Female Orphan Asylum v. City of Troy*, 76 N. Y. 108; *Doherty v. Matsell*, 119 N. Y. 646; *Kneller v. Lang*, 137 N. Y. 589; *DeLancey v. Piepgras*, 138 N. Y. 26; *Heller v. Cohen*, 154 N. Y. 299, 311; *Tyler on Ejectment*, 860; *Buswell's Lim. & Ad. Poss.* 380; *Am. & Eng. Encyc. of Law* [2nd ed.], 778.)

The entry by the Harlem Company was by the express permission of the city, under a resolution which recited that the

land entered upon was at the time owned by the city. The occupation was permissive from the outset, and, as there is no adequate evidence to the contrary, is presumed to have so continued ever since. The company recognized the title of the city by assenting to resolutions passed by the common council both before and after it accepted the deed from Benson. There was no open or notorious assertion of title under that deed, and no evidence of intention to claim title thereunder, except the deed itself, which was not recorded until after the railroad was built. There is no evidence that the city had notice, either actual or constructive, of that deed until the condemnation proceedings of 1850, when a nominal award was made to the company for its interest in the fee of the street. By an agreement duly executed under its seal, the company expressly covenanted that if permitted to occupy Fourth avenue, it would remove its railroad from the street whenever the city required it. It entered under a license and remained under a license. Its unbroken continuity of possession from that day to this has never been accompanied with the assertion of any claim hostile to the city, for its deed from Benson, under the circumstances, is no evidence of a hostile claim, but simply that it had acquired Benson's reserved rights, which cut no figure in this controversy. Possession to be effective must be hostile to the rightful owner, and if the company intended to base a claim upon its deed in hostility to the city, the circumstances required it to make the fact known to the city, as otherwise its possession is presumed to be in accordance with its agreement. (*Treadwell v. Inslee*, 120 N. Y. 458.) The city did not know that the company had repudiated its agreement and stood on the Benson deed, exclusive of any other right, if such were the fact. It did not know of the existence of that deed, for the record was no notice, as a landowner is not compelled by the Recording Act to watch the records for conveyances of his own property. To authorize the presumption of a grant, the enjoyment "must not only be uninterrupted for the period of twenty years, but it must be adverse, not by

leave or favor, but under a claim or assertion of right, and it must be with the knowledge and acquiescence of the owner." (*Flora v. Carbean*, 38 N. Y. 111; *Bedlow v. N. Y. F. Dry Dock Co.*, 112 N. Y. 263; *Parker v. Foote*, 19 Wend. 313.) When the occupant is in possession under two instruments, one subservient and the other hostile to the true owner, such possession, in the absence of positive notice to the contrary, will be regarded as subservient only, for the law raises a presumption in favor of an honest and against a dishonest purpose. This disposes of the appeal brought by the defendant, so far as it requires discussion apart from the claim of the plaintiff.

The plaintiff's appeal rests upon the proposition that she is entitled to the same relief that she would have been if there had been no railroad structure in the street prior to the erection of the steel viaduct. It would be sufficient to say in answer to this claim that as she asks aid from a court of equity, she can enforce her claim only so far as it is equitable, in the sense of being just. When she crosses the line of equity and good conscience to ask for compensation on the same basis as if Park avenue had never been a railroad street and seeks to recover damages which she has not suffered, on the ground of an alleged technical right, she must withdraw from a court of equity and seek relief at law. Since she or her predecessors submitted without complaint or question to the erection of two railroad structures in front of her property, each of which stood there for more than twenty years and wholly occupied the central portion of the street to the exclusion of all traffic therefrom, it would not be just to claim the same damages for injury to her easements by the third structure that she could properly have claimed if those easements had not been impaired by the previous structures. She has been awarded all that is equitably her due, which is the net difference, measured in money, between the effect of the old and the new structure, while in actual use, less the benefits conferred by the latter. She has also been granted an injunction to protect her hereafter, unless her permanent damages are paid upon

the same basis. A court of equity will give her no further relief.

But we will not stop here, for we wish to place our decision upon grounds equally tenable in either jurisdiction. While the defendants acquired no right by adverse possession, as against the city, they acquired certain rights by prescription as against the abutting owner.

The leading facts bearing upon the subject may be summarized as follows: The lands embraced within the lines of Fourth avenue, as originally laid out upon the maps of the city and of Benson, were, by various conveyances, resolutions of the common council and acts of the legislature, so devoted to street purposes that they could not lawfully be used for any inconsistent purpose. (*Matter of Vil. of Olean v. Steyner*, 135 N. Y. 341, 345; *Lord v. Atkins*, 138 N. Y. 184, 191; *Haight v. Littlefield*, 147 N. Y. 338, 342.) The easements of light, air and access, so far as they had any practical existence prior to 1853 when the avenue was opened, were encroached upon by the first railroad structure, which, in front of plaintiff's premises, was a solid embankment 28 feet wide at the bottom and 10 or 12 feet high, walled in with stone. From 1853 until 1873, when the first improvement required by statute was made, the avenue was open and used as a street on either side of the railroad structure in the center, which continued to encroach upon the easements of the abutting owners. From 1873, when the embankment was converted into a viaduct 56 feet wide and 7 feet high in front of the *locus in quo* until 1894, when the last improvement required by statute was begun, the same encroachment continued. As to the plaintiff and her grantors there was an open, continuous and exclusive possession and enjoyment by the railroad company of the easements in question to the extent of the user during the periods named.

Prescription rests upon the presumption of a lost deed, after adverse use and enjoyment for twenty years, which has been adopted by the courts as the prescriptive period from analogy to the Statute of Limitations. (*Woodruff v. Paddock*, 130

N. Y. 618, 624; *Snell v. Levitt*, 110 N. Y. 595; *Nicholls v. Wentworth*, 100 N. Y. 455; *Ward v. Warren*, 82 N. Y. 265; *Parker v. Foote*, 19 Wend. 309, 312; *Goddard on Easements*, 90; *Washburn on Easements* [4th ed.], 123; 19 Am. & Eng. Encyc. of Law, 7; *Jones on Easements*, § 160; *Gerard on Titles*, 745.) What the primary owner loses by his *laches* the other party gains by continued possession without question of his right. (*Campbell v. Holt*, 115 U. S. 620, 623.) The adverse use must be of the same character and duration as the adverse possession required to give title to real estate, which has already been considered. If the presumption as to a lost deed may be rebutted, still it presents a question of fact which, in this case, has been determined in favor of the defendants. The possession of the defendants was not subordinate to the plaintiff's title, nor permissive as to her, but openly hostile and necessarily known to be such, to her and her grantors, who made no objection until 1897. It was exclusive, definite and uninterrupted, for it absolutely excluded all from the part of the avenue occupied by the railroad structures. The obstruction was not out of view or knowledge, but in plain sight of the abutting owners, who, by making no objection, acquiesced in the situation. The question does not arise between the railroads and the city, which had consented in advance to the occupation, but between the railroads and the abutting owners, who had not so consented.

Under these circumstances the old structures had stood in the street so long that the railroads acquired a prescriptive right to have them stand there forever, so far as the plaintiff is concerned. The situation was the same in effect as if one of her grantors, while he owned her property, had conveyed to the defendants the right to permanently keep the stone viaduct where it stood and to use it indefinitely for railroad purposes. To the extent of the user by the companies the plaintiff, through the acquiescence of herself and her grantors, had parted with her rights when the present structure was erected. She could claim no damages on account of the old structure, so long as it stood there. She could claim no damages on

account of any new structure erected in the same place, within the same lines, and for the same purpose, which inflicted no more injury upon her property than the old. She could raise no question except such as she could have raised had she given a deed expressly assenting to the erection of the old structure. (*Conabeer Case, supra.*) Had the new structure been no higher than the old, in front of her property, none of her rights would have been invaded, and she would have been entitled to no relief. These views are not inconsistent with but are in accordance with the principles of a case relied upon by the plaintiff, where the defense of prescriptive right failed because the facts failed, as adverse user was not found to have existed for the requisite period. (*American Bank Note Co. v. N. Y. El. R. R. Co.*, 129 N. Y. 252.)

The reason why possession of the same structure was adverse to the plaintiff but not to the city, is that the former never consented to the occupation, except by acquiescence during the prescriptive period, while the latter consented to the occupation in advance, and renewed the consent by subsequent acts at frequent intervals, while the railroad company never gave notice, direct or indirect, that it claimed to occupy under its deed or otherwise than by the consent of the true owner.

Prescriptive rights, however, are measured by the user, and the defendants could make no further encroachment without liability. (*Prentice v. Geiger*, 74 N. Y. 341; *Baldwin v. Calkins*, 10 Wend. 169; *Bealey v. Shaw*, 6 East, 208; *Stiles v. Hooker*, 7 Cow. 266.) As was said by Judge ANDREWS in *Prentice v. Geiger (supra)*: "The right is supposed to have had its origin in a grant, and the grant being lost, the user is the only evidence of the right granted, and as the presumption of a grant only exists where there has been an adverse, continuous and uninterrupted user, according to the nature of the easement claimed, for the period of twenty years, the prescriptive right is confined to the right as exercised for that period of time." The plaintiff, therefore, was entitled to

recover for the additional injury to her property so far as it was caused by the defendants.

We now reach the question whether the defendants were liable for any part of the damages caused by the effect of the steel viaduct while it was in process of construction.

That structure was not erected by the defendants but by the state, as appears from the facts already stated. South of 125th street it gave them no facilities which they did not have before. The stone structure of 1872 did away with grade crossings and gave them four tracks, and this is all they have now. The change of grade north of 125th street, in order to cross the Harlem river at the height required by the general government, has no bearing upon the change of grade south of that point. The defendants are liable for what they did, but not for what the state did. (*Atwater v. Trustees, etc.*, 124 N. Y. 602.) The state created a board of experts and required them to make the improvement for the benefit of the public, giving them absolute control with no right on the part of the defendants to let or hinder. The board made the plans and did the work, letting their own contracts, employing and discharging their own men, without supervision or interference by the companies, which did not and could not set the board in motion, for the want of power, if for no other reason. The change of grade in front of the plaintiff's premises was not only for a public purpose, but was wholly in the interest of the public and not for the benefit of the defendants who had no power to prevent it. They simply paid one-half of the expense by command of the statute, and, hence, under compulsion of law. They are not liable for the acts of the Park avenue board, which was not their agent, but a governmental agency of the state. (*Benner v. Atlantic Dredging Co.*, 134 N. Y. 156, and cases cited on page 162.) Their offer in advance to obey the statute did not affect its compulsive force, for obedience was their duty. As was tersely said in a late case, the railroad company "had no choice left to it. The state intervened and directed that a work, which it had the power to require to be done, should be done, not by the

railroad nor even by the city, but by an independent board in the creation of which the defendant had no voice, over whose selection of employees it had no control, with the discharge of whose functions it could not interfere and whose operations it was powerless to prevent." (*N. Y., N. H. & H. R. R. v. Baker*, 98 Fed. Rep. 694.)

When the work was completed, if the defendants had not used it, they clearly would have been under no liability to the plaintiff. This is a decisive test, not only as to the permanent structure, but also as to the temporary trestles, which were part of the same scheme of the legislature, acting under general power, as well as that reserved when it incorporated the Harlem Company. They were erected by the same board, in the same way and under the same authority, but for the double purpose of aiding in the principal work of the state, and at the same time affording temporary relief to the defendants in the operation of their trains. The statute "authorized and directed" the defendants to operate their trains on the structures "when completed." Accordingly they laid their tracks, at first on the trestle work, which they used for a short time, and then on the steel viaduct, which they have used ever since. In thus using the work of the state they doubtless accepted it as their own, but they accepted it as a completed structure, and did not thereby become parties to the process of construction. Their acceptance did not reach back and adopt the previous acts of the state, but the effect was the same as if they had purchased it from the state on the day they commenced to use it.

Thus we strike the time when the liability of the defendants began. When they commenced to use the steel viaduct they started a new trespass upon the rights of the abutting owners. While they had a prescriptive right to use a railroad structure standing in the same place and of the same height as the stone viaduct, which was about 7 feet, they had no right, as against the plaintiff, to use the steel viaduct, which reached upward 35 feet until it was on a level with the windows of her fourth story. The new structure, so far as it stood within the lines

of the old, was not a trespass, for it lessened instead of adding to the burden, but so far as it extended above the space which it had to occupy, it was a trespass, for which the defendants have properly been held liable during the time they used it. The trestle work, which stood wholly without the lines of the stone viaduct, was a trespass without mitigation, for it substantially closed the avenue and conferred no benefit whatever upon the adjacent property. As to that structure, the liability of the defendants was absolute during the period of user.

The permanent structure, however, was not an unmitigated trespass, for upon the surface of the street it was a great improvement upon the stone viaduct, which it displaced. Before the change was made Park avenue was virtually two streets, each 42 feet wide, separated by a solid and impassable embankment 56 feet in width. Now it is 140 feet wide, with no obstruction to traffic except the columns which support the elevated roadbed. Never before could the plaintiff, or her predecessors, cross the street in front of her property, or even cross by the nearest lateral streets. For the first time in the history of the avenue its central portion is open, paved and capable of being used as a street. A substantial benefit was thus conferred, which, in assessing the damages inflicted upon the owner's easements, when no part of his land is taken, should in justice and according to authority be regarded. The basis of assessment is the difference in value of the easements as they now are and as they were with the old, and before the new viaduct was erected. (*Newman v. M. E. Ry. Co.*, 118 N. Y. 618, 624; *Bohm v. M. E. Ry. Co.*, 129 N. Y. 576, 591; *Sutro v. M. Ry. Co.*, 137 N. Y. 593; *Bischoff v. N. Y. El. R. R. Co.*, 138 N. Y. 257.) The courts below followed this rule and held the defendants liable for the net difference only.

The claim that the defendants abandoned their prescriptive rights by removing the old structure cannot be sustained. The old structure was not removed by the defendants, but by the state, of its own motion and through an independent

agency created by itself. Moreover, the removal of one railroad structure, followed immediately by the erection of another, in the same place and for the same purpose, is no evidence of an intent to abandon the prescriptive right to have a railroad structure in the street. If the new structure had not been a greater burden than the old the plaintiff would have been entitled to no relief whatever.

The effect of the condemnation proceedings of 1850, which widened the avenue, created no new easements for the benefit of the plaintiff or her predecessors, so far as the original width of the avenue was concerned. This was passed upon in the *Conabeer Case* (*supra*), and requires no discussion.

We have reached the conclusion that the learned trial judge awarded and withheld relief precisely as the law requires, and that his judgment should stand. In reaching this conclusion we have been materially aided by the opinions delivered in the Supreme Court in this and other cases affecting the locality in question, although we have not adopted all of the grounds upon which that learned court proceeded to judgment. (*Taylor v. N. Y. & H. R. R. Co.*, 27 App. Div. 190; *Welde v. N. Y. & H. R. R. Co.*, 28 App. Div. 379 and 29 Misc. Rep. 13; *Birrell v. N. Y. & H. R. R. Co.*, 41 App. Div. 506; *Sander v. N. Y. & H. R. R. Co.*, 42 App. Div. 618.)

We have decided the case before us and have not tried to decide other cases, which, although arising in the same section, rest upon different facts, and may be controlled by different principles of law. While we have carefully read the argument presented by learned counsel in behalf of the intervenors, we have limited its effect, so far as we have followed it, to the facts of this case.

The judgment should be affirmed, but as both parties appealed, without costs to either as against the other.

PARKER, Ch. J., BARTLETT, MARTIN, CULLEN and WERNER, JJ., concur; GRAY, J., not sitting.

Judgment affirmed.

ALBERT H. BEARDSLEY, Respondent, v. THE NEW YORK,
LAKE ERIE AND WESTERN RAILROAD COMPANY and JOHN G.
McCULLOUGH et al., as Receivers, Appellants.

MILEAGE BOOK ACT, UNCONSTITUTIONAL AS TO EXISTING CORPORATIONS.
The Mileage Book Act (L. 1895, ch. 1027), requiring railroad companies to issue mileage books under a penalty for refusal to do so, is unconstitutional as to corporations existing at the time of its enactment, since the statute is an illegal invasion of the property rights of such corporations, as declared by a decision of the United States Supreme Court.

Beardsley v. N. Y., L. E. & W. R. R. Co., 15 App. Div. 251, reversed.

(Argued January 29, 1900: decided March 2, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered March 2, 1897, affirming a judgment in favor of the plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Frederick B. Jennings and *Melville E. Ingalls, Jr.*, for appellants. The Mileage Book Act is unconstitutional and void because it deprives the defendants of their property and liberty of contract without due process of law, and also deprives them of the equal protection of the laws, in violation of article 14, section 1, of the Federal Constitution and of article 1, section 6, of the State Constitution. (*L. S. & M. S. Ry. Co. v. Smith*, 173 U. S. 684.) The law is well settled that a state legislature has no power to regulate fares or freights from one state to another or even the fares within the state of persons traveling to another state. Any attempt to do so is in violation of the commerce clause of the Constitution. (*Matter of State Freight Tax*, 15 Wall. 232; *Cooley v. Board of Wardens*, 12 How. [U. S.] 299; *Welton v. Missouri*, 91 U. S. 275; *G. F. Co. v. Pennsylvania*, 114 U. S. 196; *W., etc., Ry. Co. v. Illinois*, 118 U. S. 557; *C. B. Co. v. Kentucky*, 154 U. S. 204; *Hall v. De Cuir*, 95 U. S. 485; *Robbins v. S. T. Dist.*, 120 U. S. 489; *The Daniel Ball*, 10 Wall. 557.) The Mileage Book Act is not limited to purely local or internal

transportation, but clearly attempts and was intended to regulate or affect interstate commerce within the rules as laid down by the decisions, and is unconstitutional and void. (Black on Interp. of Laws, §§ 24, 26, 42; *R. R. Comrs. v. R. R. Co.*, 26 Am. & Eng. R. R. Cas. 29; *W., etc., Ry. Co. v. Illinois*, 118 U. S. 557; *F. L. & T. Co. v. R. R. Co.*, 24 Fed. Rep. 407; *P. & S. S. Co. v. Pennsylvania*, 122 U. S. 326; *G. F. Co. v. Pennsylvania*, 114 U. S. 196; *Johnson v. H. R. R. R. Co.*, 49 N. Y. 455.) The Mileage Book Act is unconstitutional and void, because it violates the provision of the Constitution which forbids the passage of an act impairing the obligation of contracts. (*People v. O'Brien*, 111 N. Y. 1; *Ball v. R. R. R. Co.*, 93 Fed. Rep. 513; *McKenna v. Edmundstone*, 91 N. Y. 231, 233; *Matter of Comrs. of Central Park*, 50 N. Y. 493.)

H. C. Mandeville for respondent. The regulation by a state legislature of domestic railroad tariffs is not an interference with interstate commerce, in the constitutional sense, although it may incidentally affect such commerce. (*Munn v. Illinois*, 94 U. S. 135; *C., B. & Q. R. R. Co. v. Iowa*, 94 U. S. 163; *Peik v. C. & N. W. Ry.*, 94 U. S. 177; *Shields v. Ohio*, 95 U. S. 319; *Trade Mark Cases*, 100 U. S. 96; *Stone v. F. L. & T. Co.*, 116 U. S. 333; *Stone v. I. C. R. R. Co.*, 116 U. S. 347; *Stone v. N. O. & N. E. R. R. Co.*, 116 U. S. 352; *C., M. & S. P. Ry. Co. v. Becker*, 32 Fed. Rep. 849; *W., etc., Ry. Co. v. Illinois*, 118 U. S. 557.) The Mileage Book Law is constitutional. (*Munn v. Illinois*, 94 U. S. 113; *C., B. & Q. R. R. Co. v. Iowa*, 94 U. S. 155; *Peik v. C. & N. W. Ry.*, 94 U. S. 164; *C., M. & St. P. R. R. Co. v. Ackley*, 94 U. S. 179; *W. & St. P. R. R. Co. v. Blake*, 94 U. S. 180; *Stone v. Wisconsin*, 94 U. S. 181; *People ex rel. v. B. & A. R. R. Co.*, 70 N. Y. 571; *G. B. Co. v. Smith*, 128 U. S. 179; *B. E. S. R. R. Co. v. B. S. R. R. Co.*, 111 N. Y. 141; *People v. Budd*, 117 N. Y. 10, 11.) Commerce is not interstate when its terminals lie within the same state, irrespective of whether the carrying is all done within such state or not. (*Gibbons v. Ogden*, 9 Wheat. 1;

Ratterman v. W. U. T. Co., 127 U. S. 411; *L. V. R. R. Co. v. Pennsylvania*, 145 U. S. 192.) All presumptions are in favor of the validity of an act of the legislature, and it is the duty of the courts to so interpret such acts as that they may be constitutional, if such interpretation is possible. (*N. Y. & O. M. R. R. Co. v. Van Horn*, 57 N. Y. 477; *Kerri-gan v. Force*, 68 N. Y. 385; *Matter of N. Y. El. R. R. Co.*, 70 N. Y. 342; *Matter of Gilbert El. Ry. Co.*, 70 N. Y. 367; *People v. Comstock*, 78 N. Y. 356; *People v. Budd*, 117 N. Y. 29; *Curtin v. Barton*, 139 N. Y. 513; *Sage v. City of Brooklyn*, 89 N. Y. 196; *S. M. Co. v. M'Collock*, 24 Fed. Rep. 668; *Grenada County Suprs. v. Brogden*, 112 U. S. 268.)

CULLEN, J. This action was brought to recover the sum of \$50 prescribed by chapter 1027 of the Laws of 1895, entitled "An act in relation to the issue of mileage books by railroad corporations," as a penalty for the defendants' refusal to issue to plaintiff a mileage book entitling the holder to travel one thousand miles on the lines of their road, as directed by that statute. The complaint alleged the incorporation of the defendant railroad company; that on July 25th, 1893, the individual defendants were appointed receivers of the defendant corporation, and have ever since continued to operate its road; that on July 8, 1895, the plaintiff tendered the defendants the sum of \$20 and demanded that they issue to him a mileage book entitling him to travel one thousand miles in accordance with the provisions of the statute mentioned, and that the defendants refused to issue such book. The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer having been overruled, the defendants, under leave given to them by the court for that purpose, served an answer by which, after reserving and insisting that the complaint did not state facts sufficient to constitute a cause of action, they set up several defenses which, for the disposition of this appeal, it is unnecessary to detail. By consent, the action was tried before the court without a jury. The trial court held

that the statute of 1895 embraced within its provisions only intra-state transportation and was a valid exercise of legislative authority, and rendered judgment for the plaintiff for the amount of the penalty. The judgment was unanimously affirmed by the Appellate Division, and from the judgment of affirmance this appeal was taken.

There is very little for us to write in this case, for the decision of the Supreme Court of the United States in *Lake Shore & M. S. Ry. Co. v. Smith* (173 U. S. 684), rendered since the judgment of the Appellate Division, has practically foreclosed all discussion on the question of the constitutionality of statutes of the character of the one before us. In that case, there was before the court for review a statute of the state of Michigan, which enacted that railroad companies within that state should keep for sale one-thousand-mile tickets valid for two years at the price of \$20 in the Lower Peninsula and \$25 in the Upper Peninsula. The Supreme Court held, through PECKHAM, J., that the statute was not a valid exercise of the police power of the state, nor of the power of the state to establish maximum prices for the transportation of persons and property "but an arbitrary enactment in favor of the persons spoken of (those who were able or willing to purchase one-thousand-mile tickets) who, in the legislative judgment, should be carried at less expense than the other members of the community." It was further held that such legislation was a violation of that part of the Constitution of the United States which forbids the taking of property without due process of law; and, hence, invalid. It is not necessary nor would it be profitable for us to review the discussion or argument by which that result was reached. It is sufficient for us to recognize the point of the decision and that the decision is binding upon us. The statute before us cannot be differentiated in principle, and hardly in detail, from that decided by the Federal court to be in violation of the Constitution of the United States. The provisions of the Constitution of Michigan differ from those of the Constitution of this state. But the case cited was taken to the Supreme

Court of the United States on appeal from a judgment of the state court. Whether the statute was in conflict with the State Constitution or not presented no question of a Federal nature, but one which it was not within the power of the Supreme Court to review, and so it is stated by Justice PECKHAM. The case did present another Federal question, whether the statute had impaired the obligation of any contract entered into between the state and the railroad company. That question was not considered, and the decision proceeded solely on the ground that the statute was an illegal invasion of the property rights of the company. In obedience to the law, as declared by the Supreme Court of the United States, we must hold the statute of 1895 is invalid as to corporations existing at the time of its enactment.

The learned counsel for the respondent urges that the objection upheld in *Lake Shore, etc., v. Smith* was not taken or raised in this case in the courts below. We think this claim is untenable. It is conceded by the respondent that the appellants, in their attack on the sufficiency of the complaint, did object that the statute was in contravention of both the Federal and State Constitutions, in that it took the defendants' property without due process of law, but he asserts that the reasoning by which the Supreme Court arrived at its decision in the case cited was not presented. It was enough that the defendants called the attention of the court to the constitutional provision which it was claimed the statute contravened; the reasoning or argument by which that claim was attempted to be supported is immaterial and would differ in different minds.

The judgment should be reversed and the complaint dismissed, with costs in all of the courts.

VANN, J. This case is necessarily governed by the principles laid down by the Supreme Court of the United States in *Lake Shore & M. S. Ry. Co. v. Smith* (173 U. S. 684). While I do not yield assent to the reasoning of that great court in that case, I am compelled to yield to its power and vote for reversal, but not for a dismissal of the complaint.

As the action of the courts below was in accordance with the law of this state as it was, apparently if not actually, when they acted, the reversal should be with leave to the plaintiff to apply at Special Term for permission to discontinue without costs, on the ground that the further prosecution of the action has been made impossible by a controlling decision not rendered by a court of this state. (*De Barante v. Deyermant*, 41 N. Y. 355; *Cole v. Rose*, 65 How. Pr. 520; *Wellington v. Claason*, 9 Abb. Pr. 175; *Winans v. Winans*, 6 N. Y. S. R. 813; *Honeywell v. Burns*, 8 Cow. 121; *Hart v. Storey*, 1 Johns. 143; *Merritt v. Arden*, 1 Wend. 92; *Van Buren v. Fort*, 4 Wend. 209; *Lackey v. M'Donald*, 1 Cai. 116; *Labron v. Woram*, 5 Hill, 373; *Camp v. Gifford*, 7 Hill, 169.)

PARKER, Ch. J., GRAY, BARTLETT, MARTIN and WERNER, JJ., concur with CULLEN, J.; VANN, J., concurs in result in memorandum.

Judgment reversed, etc.

In the Matter of the Application of FRANK McCUE, Appellant, v. THE BOARD OF SUPERVISORS OF THE COUNTY OF MONROE, Respondent.

162	285
167	621
162	235
169	28

1. TAXATION — ASSESSMENT AGAINST ESTATE. An assessment of land for taxation in the name of the "estate" of a certain person, without any qualifying or additional description, is void on its face.

2. VOLUNTARY PAYMENTS. A mere volunteer, having no interest in the property, who pays state and county taxes upon assessments of real property void on their face, without any effort having been made to collect them, is not entitled to have the same refunded upon an application, in his own name, under section 16 of the County Law (L. 1892, ch. 686), as the section does not apply to taxes voluntarily paid, but to those collected under compulsion of law.

Matter of McCue v. Board of Supervisors, 45 App. Div. 406, affirmed.

(Argued February 27, 1900; decided March 13, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered

December 22, 1899, reversing an order of the Monroe County Court directing the board of supervisors of that county to refund certain taxes alleged to have been illegally assessed.

The nature of the proceeding and the facts, so far as material, are stated in the opinion.

Delbert A. Adams for appellant. The assessments are void and petitioner is entitled to have the tax erroneously paid refunded. (*Trowbridge v. Horan*, 78 N. Y. 439; *Cromwell v. MacLean*, 123 N. Y. 474; *Matter of Adams*, 154 N. Y. 619; L. 1892, ch. 686, § 16; *Tripler v. Mayor, etc.*, 139 N. Y. 1; *Matter of Kenny*, 23 Misc. Rep. 9; *People ex rel. v. Lorillard*, 135 N. Y. 285; *Matter of McPherson*, 104 N. Y. 306; *People ex rel. v. Common Council*, 140 N. Y. 300; *Thacher v. Bd. Suprs.*, 21 Misc. Rep. 271; *Etna Ins. Co. v. Mayor, etc.*, 7 App. Div. 145.)

P. Chamberlain and *Samuel P. Moore* for respondent. The petitioner had no cause of action. The payment of a tax upon its face void, or with knowledge of the facts rendering it so, and without coercion, is voluntary. The tax so paid cannot be recovered in an action or special proceeding. (*Tripler v. Mayor, etc.*, 125 N. Y. 617; *McKibbin v. Oneida County*, 25 App. Div. 361; *Matter of Baumgarten*, 39 App. Div. 174; *Diefenthaler v. Mayor, etc.*, 111 N. Y. 331; *Bruecher v. Village of Portchester*, 101 N. Y. 240; *Jew v. Mayor, etc.*, 103 N. Y. 536; *Matter of Adams v. Suprs.*, 154 N. Y. 619.)

Per Curiam. This proceeding originated in an application made to the County Court, under the County Law, to compel the board of supervisors of Monroe county to refund taxes, illegally assessed, but voluntarily paid. (L. 1892, ch. 686, § 16.)

In August, 1880, one Henry McCue, the father of the petitioner, died, leaving a will by which he devised to his wife a house and lot in the village of Brockport, in said county. For fifteen years thereafter said house and lot was annually assessed

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Opinion *per Curiam*.

for state and county taxes to the "Estate of Henry McCue," without any qualifying or additional description. During this period the petitioner resided on the property with his mother, the owner and occupant, and although he had no pecuniary interest therein, and no attempt was made to compel payment, for nine successive years, beginning in 1887, he paid the taxes so assessed without complaint or question, so far as appears. In 1897 he applied to the board of supervisors to refund the amount so paid by him upon the ground that the assessments, made simply in the name of his father's estate, were illegal, and that he was entitled, under the County Law, to have the same repaid. No claim was made that the taxes in question were excessive or in any respect unjust. The application was denied, and thereupon he applied to the County Court upon a petition signed by him only, setting forth the foregoing facts in substance, for an order compelling the board of supervisors to refund to him the amount so paid, with interest and costs. The board resisted the application, but it was granted as to all the taxes paid within ten years before the commencement of the proceeding, and denied as to the remainder. The order of the County Court was reversed by the Appellate Division, one of the justices dissenting, and the petitioner appealed to this court.

Both parties concede that the assessments in question were void upon their face, and the concession is well founded. (*Trowbridge v. Horan*, 78 N. Y. 439; *Cromwell v. MacLean*, 123 N. Y. 474.) The appellant contends that, according to the County Law and a recent decision of this court relating thereto, the action of the County Court was right and should be sustained. (L. 1892, ch. 686, § 16; *Matter of Adams*, 154 N. Y. 619.) The respondent insists that neither the statute nor the decision relied upon by the appellant applies to this case, and that the order of the Appellate Division reversing that of the County Court should be affirmed.

Said statute authorizes the board of supervisors of any county to "correct any manifest clerical or other error in any assessment or returns made by any one or more town officers

to such board, or which may, or shall have properly come before such board for its action, confirmation or review; and cause to be refunded to any person the amount collected from him of any tax illegally or improperly assessed or levied, and upon the order of the County Court, it shall refund any such tax."

The petitioner paid said taxes as a mere volunteer, for he had no interest to protect and no obligation to discharge. The assessments were void upon their face and no effort was made to collect them. It does not appear that he paid at the request of the owner, and the presumption which might otherwise arise in that regard is precluded by the fact that he applied for restitution simply in his own name. The section quoted does not apply to taxes voluntarily paid, but to those collected under the compulsion of law, as was the case in the *Matter of Adams (supra)*, where the land assessed had been sold for non-payment of the taxes there involved. Neither the statute nor the authority invoked by the appellant has any application to this case, and the order appealed from should, therefore, be affirmed, with costs.

PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LONDON, JJ., concur.

Order affirmed.

In the Matter of the Appraisal of the Property of JOSEPH THORNE, Deceased, under the Act in Relation to Taxable Transfers of Property.

WILLIAM J. MORGAN, Comptroller of the State of New York, Appellant; EUNICE E. HUFF, Individually and as Executrix of JOSEPH THORNE, Deceased, Respondent.

1. APPEAL. The Court of Appeals has no power to review the determination of the Appellate Division in reversing a decree of the surrogate upon the facts.

2. QUESTION OF FACT — WHEN PRESENTED. A question of fact, which the Court of Appeals has no jurisdiction to review, is involved upon an appeal from an order of the Appellate Division reversing, "upon

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the facts and the law," a decree of the Surrogate's Court confirming the report of an appraiser levying a transfer tax, where the surrogate rejected and the Appellate Division accepted the version of the beneficiary's story most favorable to herself.

Matter of Thorne, 44 App. Div. 8, appeal dismissed.

(Argued February 27, 1900; decided March 13, 1900.)

APPEAL from orders of the Appellate Division of the Supreme Court in the second judicial department, entered, respectively, October 20, 1899, and November 21, 1899, reversing a decree of the Surrogate's Court of Westchester county, confirming the report of an appraiser levying a transfer tax upon the estate of Joseph Thorne, deceased.

The facts, so far as material, are stated in the opinion.

Joseph W. Middlebrook for appellant. The reversal was not upon the facts and law, although so stated in the order of reversal. (*Otten v. M. Ry. Co.*, 150 N. Y. 395; *Hirshfeld v. Fitzgerald*, 157 N. Y. 166; *Health Dept. v. Dassori*, 159 N. Y. 245; *Bini v. Smith*, 161 N. Y. 120; *Gannon v. McGuire*, 160 N. Y. 476; *Lannon v. Lynch*, 160 N. Y. 483; Code Civ. Pro. § 1338.)

W. P. Prentice for respondent. The order of the Appellate Division is conclusive in this court, there having been no dissent and the reversal having been both upon the facts and the law. (*Ostrom v. Greene*, 161 N. Y. 353; *Health Dept. v. Dassori*, 159 N. Y. 245; *Cox v. Stokes*, 156 N. Y. 491.)

HAIGHT, J. The order of the Appellate Division reversed the decree of the surrogate "upon the facts and the law." Under the Constitution the jurisdiction of this court is limited to a review of questions of law only. It, therefore, has no power to review the determination of the Appellate Division in reversing upon the facts. An examination of the record clearly shows that a question of fact was involved.

Eunice E. Huff, the respondent, claimed that Thorne gave her one thousand shares of the American Press Association stock of the value of one hundred thousand dollars (\$100,000) before his death. In her testimony she makes several con-

tradictory statements with reference to the transaction. The appraiser found that the transfer was made to her charged with a trust on her part to be performed of taking care of Thorne during his life, and that the remainder was intended to vest in her and take effect at and after his death. The surrogate, in confirming the report of the appraiser, says: "The testimony of Mrs. Huff is contradictory. The appraiser has adopted that version of her story which is most favorable to the state. In this I think he has adopted the correct rule. The witness is adverse. The result of her testimony means a difference of five thousand dollars (\$5,000) to her. We must, therefore, assume that she would put that construction upon the transaction which would be most favorable to her, and most likely to relieve her of a tax." The Appellate Division reached a different conclusion. It adopted her claim that the gift was absolute and took effect at the time that it was made, and that the title to the stock vested in Mrs. Huff from that time. It is, therefore, apparent that a question of fact was involved which this court has no jurisdiction to review. (*Livingston v. City of Albany*, 161 N. Y. 602.)

The appeal should be dismissed, with costs.

PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN, VANN and LANDON, JJ., concur.

Appeal dismissed.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE TOWN OF PLATTSBURGH, Respondent, v. ANDREW WILLIAMS, as County Treasurer of Clinton County, Appellant.

LIQUOR TAX LAW — DISPOSITION OF REVENUE — POOR FUND. The requirement of chapter 125 of the Laws of 1898 (a local statute for the benefit of the poor of the town of Plattsburgh), that "all" excise money arising from licenses granted in such town shall be deposited with the treasurer of the poor fund, is limited to the two-thirds which the Liquor Tax Law apportions to the town, and does not embrace the one-third which, by the terms of that law, is required to be paid to the state.

People ex rel. Town of Plattsburgh v. Williams, 47 App. Div. 88, reversed.

(Argued February 28, 1900; decided March 13, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered January 18, 1900, reversing an order of Special Term denying an application for a peremptory writ of mandamus and granting such writ.

The nature of the proceeding and the facts, so far as material, are stated in the opinion.

P. W. Cullinan for appellant. The act, chapter 125 of the Laws of 1898, purporting to authorize and direct the payment to the appellant of the entire sum of said liquor tax moneys received by the county treasurer on account of the liquor tax certificates issued in the town of Plattsburgh, is null and void. (*People ex rel. v. Board of Suprs.*, 67 N. Y. 109; *People v. Wilmerding*, 136 N. Y. 363.) Even if it be conceded that the act of 1898 is operative and of full force and effect, yet it does not operate to compel the county treasurer to pay to the poor fund of the town of Plattsburgh one-third of the liquor tax moneys required by the provisions of the Liquor Tax Law to be paid to the treasurer of the state of New York. (L. 1896, ch. 112, §§ 13, 25; *People ex rel. v. Murray*, 149 N. Y. 367.) The reason and intention of the lawgiver will control the strict letter of the law when the letter would lead to palpable injustice. (4 Kent's Comm. 462; *Matter of Folsom*, 56 N. Y. 60; *Smith v. People*, 47 N. Y. 330; *Matter of R. W. Comrs.*, 66 N. Y. 413; *People ex rel. v. Keller*, 158 N. Y. 187.) If there be any apparent discrepancy or repugnancy between statutes such exposition should be made so that both may stand together. (*Chamberlain v. Chamberlain*, 43 N. Y. 424; *Bowen v. Lease*, 5 Hill, 225; *McCartee v. Orphan Asylum Soc.*, 9 Cow. 437.)

David H. Agnew for respondent. The entire sum of money received by the county treasurer of Clinton county for and on account of the issuing of liquor tax certificates in the town of Plattsburgh in said county for the year 1899, should be paid over to the town of Plattsburgh, pursuant to chapter

125 of the Laws of 1898, which amended section 3 of chapter 471 of the Laws of 1894. (*People ex rel. v. Bd. Canvassers*, 143 N. Y. 84; *Dwarris on Stat. Cons.* § 702; *Matter of City of Brooklyn*, 148 N. Y. 107; *People ex rel. v. Bd. Suprs.*, 67 N. Y. 109; *Ely v. Holton*, 15 N. Y. 595.) The act of 1898 repealed all acts inconsistent therewith, including chapter 112 of the Laws of 1896 as amended in 1897. (*Matter of Prime*, 136 N. Y. 347; *People ex rel. v. Comrs.*, 95 N. Y. 554; *Smith v. People*, 47 N. Y. 330; *People v. Green Co.*, 13 Abb. [N. C.] 424; *Gardner v. Collins*, 2 Pet. [U. S.] 93; *Rosenplaenter v. Roessle*, 54 N. Y. 262; 23 Am. & Eng. Ency. of Law, 299.) The act of 1898 and the act of 1896, as amended, are inconsistent and repugnant to each other and cannot be construed *in pari materia* even as to one-third of the money for the reason the language used is unambiguous. (*Bowen v. Lease*, 5 Hill, 221; *Village of Gloversville v. Howell*, 70 N. Y. 287; 1 Kent's Comm. 46; *Fairchild v. Gwynne*, 16 Abb. Pr. 23; *Woods v. Bd. of Suprs.*, 136 N. Y. 411.) Every intendment is in favor of the constitutionality of a statute, that its enactment was a valid exercise of legislative power, and this though the natural interpretation of the language used in it would be to the contrary. (*Village of Gloversville v. Howell*, 70 N. Y. 287; *Roosevelt v. Godard*, 52 Barb. 533; *McDougall v. State*, 109 N. Y. 73; *People ex rel. v. Bd. Suprs.*, 17 N. Y. 241; *People ex rel. v. Terry*, 108 N. Y. 7; *Bush v. Bd. Suprs.*, 159 N. Y. 212.)

HAIGHT, J. The order of the Appellate Division directed the issuance of a peremptory writ of mandamus compelling the county treasurer of Clinton county to turn over to the town of Plattsburgh all of the liquor tax moneys received by him for the granting of liquor tax certificates in the town of Plattsburgh.

In 1896 the legislature saw fit to make a radical change in the excise laws of the state. This was accomplished by the enactment of chapter 112 of the laws of that year, known as the Liquor Tax Law, by which it is provided that "One-third

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Opinion of the Court, per HAIGHT, J.

of the revenues resulting from taxes, fines and penalties under the provisions of this act, less the amount allowed for collecting the same, shall be paid by the county treasurer, and by the several special deputy commissioners within ten days from the receipt thereof, to the treasurer of the state of New York, to the credit of the general fund, as a part of the general tax revenue of the state, and shall be appropriated to the payment of the current general expenses of the state, and the remaining two-thirds thereof, less the amount allowed for collecting the same, shall belong to the town or city in which the traffic was carried on from which the revenues were received," etc. (Section 13.) By section 44 of the act the provisions of any special or local law, grant or charter in conflict with the act were repealed and annulled. (*People ex rel. Einsfeld v. Murray*, 149 N. Y. 376.)

Prior to the adoption of the Liquor Tax Law there existed local statutes providing that the excise money collected in the town of Plattsburgh should be turned over to the treasurer of the poor fund of the town to be used for the relief of the poor, as provided in the act. After the adoption of the Liquor Tax Law the legislature enacted chapter 125 of the Laws of 1898, which is entitled "An act to amend section three of chapter 471 of the Laws of 1894, entitled 'An act to amend chapter 435 of the Laws of 1879, entitled an act in relation to the raising of funds for the relief of the poor of the town of Plattsburgh, in the county of Clinton.'" So much of section three, as amended, as is material to the question under consideration, provides as follows: "All excise money arising from licenses granted in the town of Plattsburgh shall be deposited with the treasurer of the poor fund of said town by the county treasurer of said county within ten days after the receipt by him of the same."

It is contended that the provisions of this act require the county treasurer to pay over to the treasurer of the poor fund of the town of Plattsburgh all of the moneys arising from licenses granted in the town belonging to it, as well as the moneys belonging to the state. If this contention is sustained

then the provisions of the act must be deemed to have amended the Liquor Tax Law, and to have appropriated from the treasury of the state the moneys belonging to it collected under the provisions of that act for the benefit of the general fund of the state. By referring to the title of the act it will be observed that it is a local statute for the benefit of the poor of the town of Plattsburgh. None of its provisions refer to or mention the Liquor Tax Law, or in terms purport to amend it, or to appropriate any of the money belonging to the state. In interpreting the meaning of statutes the rule is to give effect to the legislative intent. Such intent, we think, is clearly manifest in the enactment in question. In the absence of any provision appropriating the money belonging to the state, the provisions of the act being local, must be deemed to apply and have reference to "all of the excise money arising from licenses granted in the town of Plattsburgh," belonging to the town, and not to that which belongs to the state.

This construction of the local act leaves it in harmony with the provisions of the general act and sustains the general policy of the state, as disclosed through the Liquor Tax Law.

The order of the Appellate Division should be reversed and that of the Special Term affirmed, with costs.

PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN and VANN, JJ., concur; LANDON, J., not sitting.

Order reversed, etc.

In the Matter of the Estate of EDMUND G. THURBER, an
Incompetent Person.

AMERICAN SURETY COMPANY, OF NEW YORK, Petitioner,
Appellant; FANNIE C. THURBER, Committee, Respondent.

1. REVIEW OF ORDER BASED UPON WANT OF POWER. Where an order appealed from states that the determination of the Appellate Division was based upon a want of power to grant the application, without considering the question of discretion, a question of law is presented which it is the duty of the Court of Appeals to review, even if the courts below might have denied the application in the exercise of discretion.

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Statement of case.

2. **RIGHT OF SURETY COMPANY TO BE RELEASED UNDER SECTION 812 CODE OF CIVIL PROCEDURE — WHEN NOT WAIVED.** Fidelity and surety companies, being authorized to contract as sureties upon official bonds under section 812 of the Code of Civil Procedure, are not excepted from the provisions thereof, authorizing "sureties upon certain official bonds to petition for release from liability" thereunder, and can avail themselves, in proper cases, of such remedies as the Code provides for sureties generally; and a surety company does not waive such rights by accepting a contract of indemnity which expressly provides that acceptance of security or consideration should not "limit or abridge any right or remedy which the surety otherwise might have."

3. **DISCRETIONARY POWER OF COURT.** The provision of section 812 of the Code of Civil Procedure, that the court "must issue an order" to the principal requiring him "to show cause" why he should not account and give new sureties, is not a mere substitute for a notice of motion, but is part of a special remedy and implies that cause may be shown. The court has a discretion to exercise depending on the facts in the case, and is not commanded to make a decree requiring the principal to show cause regardless of those facts. The expression "a decree must be made" means, under the circumstances, "a decree may be made."

Matter of Thurber, 43 App. Div. 528, reversed.

(Argued February 26, 1900; decided March 13, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, made October 3, 1899, affirming an order of Special Term denying the application of petitioner to be released as surety upon the bond of the respondent herein.

The nature of the proceeding and the facts, so far as material, are stated in the opinion.

Edwin Countryman for appellant. The statement contained in the order of affirmance relieves this court from considering any question except the one proposition of law which that certificate presents. (*Tolman v. S., B. & N. Y. R. R. Co.*, 92 N. Y. 353.) Surety companies come before the courts precisely as would private individuals who are doing the same thing in the same way; and this appellant stands before the court precisely as would a private individual who, for the same consideration and on the same terms, had entered into the obligation, and is, therefore, clearly within

the provisions of section 812 of the Code of Civil Procedure. (Const. N. Y. art. 8; Code Civ. Pro. § 1538.) The fact that the section requires an order to show cause does not imply that the surety cannot claim a discharge as a matter of right. (*Lewis v. Watson*, 3 Redf. 43; *Stevens v. Stevens*, 3 Redf. 507; *Shook v. Goddard*, 2 Dem. 201.)

Raymond C. Haff for respondent. If section 812 of the Code of Civil Procedure was intended to reach the case of a surety who became such by reason of a valuable consideration, as well as the ordinary gratuitous surety, it impairs the obligation of a contract and is *pro tanto* void. (*Pringle v. L. I. R. R. Co.*, 157 N. Y. 100.) Section 812 of the Code of Civil Procedure, providing for the discharge of a surety upon his own application, does not apply to surety companies. (L. 1881, ch. 486.) A surety company who became surety for a valuable consideration is not entitled to be discharged against the wishes of the principal, where no such right is reserved to the company in the contract, and the moving papers fail to show any breach by the principal of the obligation or that the surety company has suffered, or is liable to suffer, any damage. (Code Civ. Pro. § 812; *Hayes v. Davidson*, 98 N. Y. 19; *Levy v. Dunn*, 160 N. Y. 504.)

VANN, J. This proceeding was commenced by an application made by the American Surety Company of New York, under section 812 of the Code of Civil Procedure, to be released as surety upon the bond of Fannie C. Thurber, the committee of Edmund G. Thurber, an incompetent person.

In October, 1897, Edmund G. Thurber was adjudged a lunatic, and Fannie C. Thurber was appointed his committee upon giving a bond in the usual form in the penalty of \$50,000. The bond was given on the 20th of August, 1898, the American Surety Company signing the same as surety in consideration of \$50, paid down by Mrs. Thurber, and the agreement to pay \$25 a year annually thereafter while the bond was in force. Before signing the bond the surety company

accepted a contract from Mrs. Thurber, whereby she agreed, among other things, to hold the company harmless, notify it of suits and deposit any moneys coming into her hands in an accredited trust company, the same to be withdrawn only upon checks signed by her as committee and countersigned by the surety company or its representative. It was also provided that "this agreement shall not, nor shall acceptance by the surety of payment for its suretyship, nor agreement to accept, nor acceptance by it at any time of other security, in any way abridge, defer or limit its right to be subrogated to any right or remedy, or limit or abridge any right or remedy which the surety otherwise might or may have, acquire, exercise or enforce."

In February, 1899, while the bond was still in force, an order was granted, upon the petition of the company, requiring Mrs. Thurber to show cause why she should not furnish new sureties and render an account as committee or be removed from that position. She tried to show cause by presenting an affidavit establishing perfect regularity of procedure on her part as committee, and alleging that the company was acting through ulterior motives induced by the lunatic's relatives, who had refused to recognize her as his wife or their child as his legitimate son. She charged that their object was to prevent her from prosecuting certain actions to set aside contracts, made by the lunatic, in which one of their number was interested. She made out a strong case of hardship and injustice, which would have authorized the court, if its power is discretionary, to exercise its discretion by denying the motion. The Special Term denied the application upon the ground that section 812 of the Code was not intended to apply to the case of a surety for consideration, as distinguished from a gratuitous surety. Among the recitals of the order, as finally entered, is the statement that the company, on the argument of the motion, offered to return to Mrs. Thurber the premium paid by her.

The Appellate Division stated in its order of affirmance that it was "made upon the ground that the provisions of sec-

tion 812 of the Code of Civil Procedure, providing for the release or discharge of sureties from further liability, or liability for a subsequent act or default of the principal, do not apply to this case, the surety here being a corporation organized for surety purposes, and having become surety herein for compensation, and pursuant to a contract appearing on the record."

As it appears in the order appealed from that the determination of the Appellate Division was based on a want of power to grant the application, a question of law is presented which it is our duty to review, even if the courts below might have denied the application in the exercise of discretion. (*Tolman v. S., B. & N. Y. R. R. Co.*, 92 N. Y. 354.) The order states in effect that the court simply decided the question of power without considering the question of discretion.

The power of the court depends on the construction of section 812 of the Code of Civil Procedure, which occurs in an article entitled "General Regulations respecting Bonds and Undertakings." It is provided by section 810, which is the beginning of the article, that a bond or undertaking given in an action or special proceeding must be acknowledged or proved and certified in like manner as a deed to be recorded. Section 811 provides, among other things, that "the execution of any such bond or undertaking by any fidelity or surety company authorized by the laws of this state to transact business, shall be equivalent to the execution of said bond or undertaking by two sureties, and such company, if excepted to, shall justify through its officers or attorney in the manner required by law of fidelity and surety companies." Section 812 requires the bond to be joint and several in form where two or more persons execute it, and "except when executed by a fidelity or surety company, or when otherwise expressly prescribed by law, it must be accompanied with the affidavit of each surety" as to his qualifications. After making other regulations relating to the subject, the section further provides that "the surety or sureties, or the representatives of any surety or sureties upon the bond of any trustee, committee * * * or other

fiduciary may present a petition to the court or judge that accepted such bond, praying to be relieved from further liability as such surety or sureties for the act or omission of the principal named in such bond occurring after the date of the order relieving such surety or sureties hereinafter provided for and that such principal be required to show cause why he should not account and give new sureties. Thereupon, the court or judge must issue an order to show cause accordingly and may restrain such principal from acting, except to preserve the trust estate until further order. Upon the return of the order so issued, if the principal in the bond file a new bond in the usual form to the satisfaction of the court or judge within such reasonable time, not exceeding five days, as the court or judge fixes, the court or judge must make a decree or order requiring the principal to account for all his acts and proceedings to and including the date of such order and to file such account within a time fixed not exceeding twenty days and releasing the surety or sureties petitioning from liability upon the bond for any subsequent act or default of the principal. If the principal fails so to file such bond within the time specified, *a decree must be made* revoking the appointment of such principal and requiring him to so account, and file such account within twenty days. After the filing of an account as required in this section, the court or judge must, upon the petition of the surety or sureties, or the representatives of such surety or sureties, issue an order requiring all persons interested in the estate or trust funds, to attend a settlement of such account at a time and place therein specified, and upon the trust fund or estate being found or made good and paid over or properly secured, the surety or sureties shall be discharged from any and all further liability upon such bond."

The argument in support of the position taken by the courts below is that while the general words "surety or sureties" are broad enough to embrace surety companies, as the legislature, when referring to such a company elsewhere in the section or the one preceding, named it in terms, and did not so name it

in the provisions authorizing the court to relieve a surety from further liability, it is presumed that there was no intention to give such a surety the right to apply for such relief.

That part of the Code of Civil Procedure which went into effect on the first of September, 1877, embraced sections 811 and 812, which then contained no authority to surety companies to sign bonds or undertakings, and no provision authorizing any surety to apply for the relief now authorized by the latter section. (L. 1877, ch. 318.) In 1881 an act was passed authorizing the acceptance of certain corporations as sureties upon bonds and undertakings required or allowed by law, and in 1893 another act was passed of the same character with more elaborate provisions. (L. 1881, ch. 486; L. 1893, ch. 720.) In 1886 section 811 of the Code was so amended as to authorize the execution of bonds or undertakings by fidelity or surety companies authorized to transact business in this state. (L. 1886, ch. 416.) In 1892 section 812 was amended so as to authorize sureties upon certain official bonds to petition for release from liability, and this is the first appearance of any provision upon that subject in the Code which we have been able to discover. (L. 1892, ch. 568.) In 1895 said section was further amended by inserting in the earlier part thereof the provisions relating to fidelity and surety companies, which now appear therein. (L. 1895, ch. 511.) At this time surety companies had been doing business throughout the state for a number of years, as the legislature, from its own action, is presumed to have known. When, therefore, it inserted a general provision relating to fidelity and surety companies in the earlier part of the section, if it had intended to except such companies from the provisions of the latter part, applying to sureties generally, the presumption is it would have said so in terms. It cannot be presumed that when amending the forepart of the section its members failed to read the remainder, or to comprehend the effect of the amendment upon the section as a whole. It allowed the general language, which theretofore had included all sureties authorized to sign bonds given in judicial proceedings, to

remain after the section was so extended as to include fidelity and surety companies. As they are expressly named in one part and named generally in another, with no exception or qualification, there is no adequate reason to believe that the legislature intended to exclude them from any part. There was no necessity for repeating the words "fidelity or surety companies" in order to make the section, as an entirety, apply to them, for they had already been named and were necessarily included, unless expressly excepted. As the legislature did not make any exception, we cannot, for there is no basis for an exception by implication. The section refers to any surety or sureties, and the appellant is a surety. Having contracted as a surety in the manner authorized by the Code, it can avail itself of such remedies as the Code provides for sureties generally.

Surety companies are a convenience to the community, and it is important that they should continue sound and able to respond to their obligations. The legislature doubtless intended to promote their stability by extending the same protection to them that it extends to other sureties. The contracts of such companies are usually based upon an annual premium for a continuing bond. If the premium were not paid after the first year and the company could not avail itself of the privilege of the statute, its responsibility would continue with no compensation, for the bond would still be in force. No company can do business on such a basis. Moreover, if the annual premiums are paid, but the principal is squandering the estate, how can a surety company protect itself? Through its officers it may inform those interested, and request action on their part, but if they reply, "you are good and we are safe," what relief is there unless it is under this section? If it cannot induce those ultimately entitled to the money or property to act, its condition is hopeless and bankruptcy may be the result. These considerations, and others of like character, may well have influenced the action of the legislature when it amended the section under consideration.

The provisions of the statute authorizing the company to

become a surety are part of the contract of suretyship, and were not waived by accepting the contract of indemnity, which expressly provides that acceptance of security or consideration should not "limit or abridge any right or remedy which the surety otherwise might have." We think, therefore, that the courts below fell into error when they held that section 812 did not apply to this case, and declined to pass upon any other question.

The appellant claims that the provisions of the section are mandatory, as the word "must" ordinarily excludes discretion. That word, however, is occasionally used in the Code without the imperative meaning which it usually has. (*Spears v. Mayor, etc.*, 72 N. Y. 442; *Wallace v. Feely*, 61 How. Pr. 225; affirmed, 88 N. Y. 646.) The provision requiring the court to "issue an order to show cause" implies that cause may be shown. It is more than a substitute for a notice of motion, for it is a specific requirement in a statute creating a special remedy, of which it is a part. There is no reason why the principal should be required to show cause, if no cause can be shown under any circumstances. When all the provisions of the section are read together, we think the court has a discretion to exercise depending on the facts of the case, and is not commanded to make a decree regardless of those facts. In other words, we construe the expression "a decree must be made" under the circumstances to mean "a decree may be made," and hence the Special Term had a discretion to exercise in the first instance and the Appellate Division by way of review. Neither court, however, exercised its discretion or considered the subject, because both held that section 812 did not apply to a surety company. The application of the company, therefore, has not yet been fully passed upon, so we are compelled to reverse the order appealed from and remit the proceeding to the Appellate Division for further action.

PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN and LANDON, JJ., concur.

Order reversed, etc.

AARON R. STEVENS et al., Appellants, v. THE CENTRAL
NATIONAL BANK OF BOSTON et al., Respondents.

162	253
170	125

APPEAL — ORDER OF APPELLATE DIVISION DISMISSING APPEAL. No appeal can be taken to the Court of Appeals from an "order" of the Appellate Division dismissing an appeal from the judgment below; but the proper practice is to enter a judgment of dismissal upon the order and then appeal from such judgment.

Stevens v. Central Nat. Bank, 85 App. Div. 35, appeal dismissed.

(Argued February 28, 1900; decided March 13, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered December 8, 1898, affirming an order of Special Term directing the entry of a judgment in favor of defendants and awarding them costs and an extra allowance, and dismissing the appeal from such judgment.

The nature of the action and the facts, so far as material, are stated in the opinion.

Edward Winslow Paige for appellants. The order is one finally determining an action and is, therefore, appealable. (Code Civ. Pro. §§ 190, 3228-3230.)

Charles E. Patterson for respondents. This court has not jurisdiction to review the order appealed from. (*Van Arsdale v. King*, 155 N. Y. 325; *N. Y. S. & T. Co. v. S. G. & E. L. Co.*, 156 N. Y. 645; *City of Johnstown v. Wade*, 157 N. Y. 50.)

O'BRIEN, J. The judgment in this case having been affirmed in this court (144 N. Y. 50), was taken to the Supreme Court of the United States upon a writ of error, where it was reversed, with costs, in so far as it affected the Central National Bank of Boston and the parties represented by it in the litigation. The case was remitted to this court by the Federal court with its mandate that further proceedings be had in the state courts not inconsistent with the decision.

This court remitted the record with the mandate to the Supreme Court of this state with directions to carry the judgment of the Federal court into effect, *without costs in this court*. The Supreme Court of this state at Special Term received the record and took into consideration the form of the final judgment to be entered. Its decision is expressed in the form of an order regularly entered upon an opinion stating the principles upon which costs should be awarded to the bank and other parties who have succeeded in the Supreme Court of the United States. Upon this order and the record judgment was entered against the plaintiff for \$3,851.10 costs. The plaintiff appealed to the Appellate Division from the order of the Special Term and from the judgment. That court affirmed the order and dismissed the appeal from the judgment. The decision is expressed in the form of an order, and from *that order*, so far as it dismissed the appeal from the judgment, the plaintiff has appealed to this court.

The contention of the learned counsel for the plaintiff is that the judgment for costs entered below was unauthorized by the judgment and mandate of the Federal court and proceeded upon an erroneous construction of the scope and effect of that judgment as well as of the judgment of this court. We refrain from any consideration of these questions, since we think this court has no jurisdiction to entertain such an appeal. Appeals to this court may be taken as matter of right only "from judgments or orders finally determining actions or special proceedings, and from orders granting new trials on exceptions, where the appellants stipulate that upon affirmance, judgment absolute shall be rendered against them." (Code, § 190.) The scope and meaning of this section has been fully considered and determined in this court. (*Van Arsdale v. King*, 155 N. Y. 325.) The order in question is not a final order in a special proceeding, nor an order granting a new trial upon exceptions. It is what is called in article six, section nine, of the Constitution a *decision*, which is but the authority or basis for a judgment or order, and I cannot find that an appeal ever did lie to this court from a mere decision of

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Statement of case.

that character. It is clear, however, that no appeal can be taken now from such an order. The proper practice is to enter a judgment upon such an order and then appeal from the judgment. In this case it would be a judgment of dismissal merely, but still it would be in form a *judgment*, and not an order authorizing a judgment.

When an appeal is taken to this court from a judgment, the form which it assumes in the court below, whether of affirmance, reversal, modification or dismissal, is not material. The courts below cannot deprive this court, in a proper case, of jurisdiction by dismissing an appeal and thus leaving the judgment complained of in force. In many cases that would have the same effect upon the rights of the parties as an affirmance. But the difficulty in this case is that there is no judgment of any kind, and we cannot review a mere decision or order which is but the evidence of the right to enter a judgment. It is just as essential for the purpose of a review in this court that a mere order or decision below dismissing the appeal should be followed by a judgment, as it is when a like order or decision is made at the trial dismissing the complaint. In such cases the action of the court is not perfected in the sense that it is in a condition to be reviewed in this court until a judgment in the usual form is entered. It follows that the appeal in this case is premature and should be dismissed, with ten dollars costs.

PARKER, Ch. J., BARTLETT, HAIGHT, MARTIN and VANN, JJ., concur; LANDON, J., not sitting.

Appeal dismissed.

JAMES KETTLE, Appellant, v. JOHN TURL et al., Respondents.

1. CONTRIBUTORY NEGLIGENCE—WHEN A QUESTION OF LAW. The question of contributory negligence is generally one of fact to be determined by the jury; and it is only where it clearly appears from the circumstances, or is proved by uncontroverted evidence, that the party injured has, by his own acts or neglect, contributed to the injury, that the court can determine that question.

162	255
166	285
162	255
75 AD.	5

2. WHEN A QUESTION OF FACT. In an action for personal injuries alleged to have been caused by the negligence of defendants, in which it appeared that plaintiff was struck by the whiffletrees of defendants' passing truck, as he was mounting his own truck, which was standing close to the curb, on the right-hand side of a street sixty feet wide from curb to curb, the questions of defendants' negligence and plaintiff's freedom from contributory negligence, *held*, under the facts and circumstances of the case, to be questions of fact.

Kettle v. Turl, 13 Misc. Rep. 156, reversed.

(Argued March 2, 1900; decided March 13, 1900.)

APPEAL from an order of the General Term of the New York Court of Common Pleas, entered June 17, 1895, overruling the plaintiff's exceptions, ordered to be heard in the first instance by that court, and denying a motion for a new trial, and from the judgment in favor of defendants, dismissing the complaint upon the merits, entered upon such order.

The nature of the action and the facts, so far as material, are stated in the opinion.

John H. Whiting and *George H. Hart* for appellant. The defendants' driver was grossly negligent. (*Moebus v. Herrmann*, 108 N. Y. 349; *Murphy v. Orr*, 96 N. Y. 14; *Chisholm v. State, etc.*, 141 N. Y. 246; *Johnson v. S. G. & L. Co.*, 146 N. Y. 160; *Bagley v. Bowe*, 105 N. Y. 171; *Powers v. Silberstein*, 108 N. Y. 160; *Feeney v. L. I. R. R. Co.*, 116 N. Y. 375.) The plaintiff was not negligent. The decision of the General Term is anomalous. (*Weston v. City of Troy*, 139 N. Y. 282; *Hoes v. E. G. El. Co.*, 161 N. Y. 35; *Moebus v. Herrmann*, 108 N. Y. 349; *Palmer v. N. Y. C. & H. R. R. Co.*, 112 N. Y. 234; *Beecher v. L. I. R. R. Co.*, 161 N. Y. 222; *Greany v. L. I. R. R. Co.*, 101 N. Y. 419; *Rottenberg v. Segelke*, 6 Misc. Rep. 3; *Curtin v. M. S. Ry. Co.*, 22 Misc. Rep. 83; *Anselment v. Daniell*, 4 Misc. Rep. 144; *Tarler v. M. S. Ry. Co.*, 21 Misc. Rep. 684.) Even if contributory negligence be assumed, such contributory negligence was not the direct and proximate cause of the accident. Had the defendants' driver exercised reasonable care and prudence, the accident would have been avoided.

(*Austin v. N. J. S. Co.*, 43 N. Y. 77; *Ochsenbein v. Shapley*, 85 N. Y. 224; *Costello v. T. A. R. R. Co.*, 161 N. Y. 317; *Ottendorf v. Willis*, 80 Hun, 262.) The plaintiff was only required to exercise an amount of care commensurate to the apparent danger, and whether or not he did so was for the jury. (*Kellogg v. N. Y. C. & H. R. R. Co.*, 79 N. Y. 72; *Stackus v. N. Y. C. & H. R. R. Co.*, 79 N. Y. 467; *McGuire v. Spence*, 91 N. Y. 303; *Newson v. N. Y. C. R. Co.*, 29 N. Y. 390; *Krulder v. Wolverton*, 11 Misc. Rep. 537; *Ferguson v. Ehret*, 10 Misc. Rep. 217; *Guichard v. New*, 84 Hun, 54; *Caldwell v. Arnheim*, 81 Hun, 39; *Buhrens v. D. D., etc., R. R. Co.*, 53 Hun, 571.) The plaintiff was entitled to go to the jury unless the inference of his negligence was certain and incontrovertible. (*Thurber v. H. B., M. & F. R. R. Co.*, 60 N. Y. 331; *Wendell v. N. Y. C. & H. R. R. R. Co.*, 91 N. Y. 420; *Ernst v. H. R. R. R. Co.*, 35 N. Y. 38; *Chisholm v. State*, 141 N. Y. 246; *Bagley v. Bowe*, 105 N. Y. 171; *Powers v. Silberstein*, 108 N. Y. 169; *Feeney v. L. I. R. R. Co.*, 116 N. Y. 375; *Moebus v. Herrmann*, 108 N. Y. 349.)

William W. Niles, Jr., for respondents. The court's disposition of the motion to dismiss the complaint was correct. (*Steres v. O. & S. R. R. Co.*, 18 N. Y. 422; *Barker v. Savage*, 45 N. Y. 191; *Eckert v. L. I. R. R. Co.*, 43 N. Y. 502; *Nash v. N. Y. C. & H. R. R. R. Co.*, 125 N. Y. 715; *Schneider v. S. A. R. R. Co.*, 133 N. Y. 583; *Gray v. Tompkins*, 40 N. Y. S. R. 546; *Cadwell v. Arnheim*, 152 N. Y. 183; *Pakalinsky v. N. Y. C. & H. R. R. R. Co.*, 82 N. Y. 427; *Cosgrove v. N. Y. C. & H. R. R. R. Co.*, 87 N. Y. 91; *Spooner v. D., L. & W. R. R. Co.*, 115 N. Y. 22.) The plaintiff voluntarily placed himself in a position of danger, and must be held to abide the consequences of his rash act. (*Morris v. L. S. & M. S. Ry. Co.*, 148 N. Y. 184; *Tucker v. N. Y. C. & H. R. R. R. Co.*, 124 N. Y. 308; *Wiwirowski v. L. S. & M. S. Ry. Co.*, 124 N. Y. 420; *Whalen v. C.*

G. L. Co., 151 N. Y. 70.) Even if the defendants had been guilty of negligence the plaintiff cannot recover unless he was free from negligence. (*Button v. H. R. R. Co.*, 18 N. Y. 256.)

MARTIN, J. This action was for negligence. The plaintiff was a truckman in the city of New York driving his own team. On November 16, 1891, shortly after nine o'clock in the morning, he was coming down Tenth avenue, when he discovered a knife lying in the street. He drove his team to the curb on the right-hand side, alighted, passed to the rear, picked up the knife, returned to the front of his truck, put his hand upon the seat, and in attempting to remount stepped upon the hub of the wheel, when he was struck by the whiffletrees upon the defendants' passing truck, thrown to the street and his right leg broken.

At the place where the plaintiff's team stood, the street was sixty feet from curb to curb, so that there was abundant room for the defendants' truck to pass without coming in contact with or near the plaintiff.

That the evidence contained in the record was sufficient to justify the jury in finding that the defendants were negligent, is not seriously disputed. Upon the trial, however, the court nonsuited the plaintiff upon the ground that he was guilty of contributory negligence as a matter of law. This determination was affirmed by the General Term, and presents the only question to be determined upon this appeal.

We think it is obvious that the court could not properly hold as a matter of law that the plaintiff was guilty of contributory negligence. The question of contributory negligence is generally one of fact to be determined by the jury, and it is not within the province of the court. It is only where it clearly appears from the circumstances, or is proved by uncontroverted evidence that the party injured has, by his own acts or neglect, contributed to the injury, that the court can determine that question. The cases are exceptional where it can be held that contributory negligence was so conclusively

established that nothing was left either of inference or of fact to be determined by a jury.

The questions in this case as to contributory negligence were: 1. What constituted ordinary care under the circumstances established upon the trial, and, 2. Was the conduct of the plaintiff such as to show that he exercised that degree of care? Both of these questions were for the jury.

The facts and circumstances of this case disclose that there is no standard fixed by law by which the plaintiff's contributory negligence could be determined. Clearly, both the question of the defendants' negligence and the plaintiff's freedom from contributory negligence were, under the proof, questions of fact. Hence, the trial court erred in granting the defendants' motion for a nonsuit, and the learned General Term erroneously overruled the plaintiff's exceptions, denied his motion for a new trial, and directed a judgment for the defendants.

The judgment should be reversed and a new trial granted, with costs to abide the event.

PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN and LANDON, JJ., concur.

Judgment reversed, etc.

LEWIS P. ROSS, Respondent, v. CHAUNCEY C. CAYWOOD et al.,
Appellants, Impleaded with Others.

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162	259
172	419

1. **APPEAL — FINAL JUDGMENT ON REVERSAL.** The Appellate Division has no power, upon reversing a judgment which dismisses the complaint in a creditor's action, to render a final judgment in plaintiff's favor, where the facts were not found by the trial court and there was a question of fraud in the case which did not depend upon documentary evidence, but upon conflicting oral testimony, and it is obvious that further evidence relating thereto may be produced upon a new trial.

2. **EXCEPTION TO DECISION DISMISSING COMPLAINT.** To enable the Appellate Division to review a judgment based upon a decision of the trial court in an action tried without a jury, which merely dismisses the complaint, an exception to the decision is necessary whether such decision was made under section 1021 or 1022 of the Code of Civil Procedure.

3. EXCEPTION TO RULING UPON QUESTION OF LAW. A decision under section 1021 of the Code of Civil Procedure, which merely dismisses the plaintiff's complaint without making any findings of fact, is a ruling upon a question of law made after the cause is finally submitted, and an exception must be taken thereto in order to present the question to a court of review.

4. FAILURE TO TAKE EXCEPTION — WAIVER. The right to object in the Court of Appeals to the failure of the adverse party to take an exception to the decision of the trial court is not waived by failing to make it the subject of a distinct point in the Appellate Division or to make the specific claim that the latter court had no jurisdiction to review the decision, and by stating in such court that the sole question in the case was one relating to the merits, where the brief in such court called attention to the lack of exceptions.

Ross v. Caywood, 16 App. Div. 591, reversed.

(Argued March 2, 1900; decided March 13, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 12, 1897, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term, and rendering a final judgment in favor of plaintiff for the relief demanded in the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

David B. Hill for appellants. It was error, on reversing the judgment of the Special Term, to award judgment absolute against the defendants, instead of granting a new trial. (*Heller v. Cohen*, 154 N. Y. 299; *Canavan v. Stuyvesant*, 154 N. Y. 89; *New v. Vil. of New Rochelle*, 158 N. Y. 41; *Cuff v. Dorland*, 57 N. Y. 560; *Guernsey v. Miller*, 80 N. Y. 181; *Foot v. A. L. Ins. Co.*, 61 N. Y. 571; *Astor v. L'Amoureux*, 8 N. Y. 107; *Snyder v. Seaman*, 157 N. Y. 449.) The judgment of the Special Term should have been affirmed. (*Ball v. Loomis*, 29 N. Y. 412; *Cohen v. Dupont*, 1 Sandf. 260, 262; *Teeter v. Teeter*, 47 N. Y. S. R. 579, 580; *Costello v. Herbst*, 16 Misc. Rep. 687; 18 Misc. Rep. 176; *Devlin v. G. Sav. Bank*, 125 N. Y. 756; *Crane v. Baudouine*, 55 N. Y. 256; *Westerlo v. De Witt*, 36 N. Y. 340; *Penfield v.*

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Sage, 71 Hun, 573; *Amherst College v. Ritch*, 151 N. Y. 320; *People ex rel. v. Barker*, 152 N. Y. 435.)

David Hays for respondent. The Appellate Division properly reversed the judgment dismissing the complaint. The undisputed evidence compels the inference that the vendees bought with notice of Holcomb's fraudulent intent. (*Roebor v. Bowe*, 26 Hun, 554; *Edgell v. Lowell*, 4 Vt. 405; *Seymour v. Wilson*, 19 N. Y. 417; *Anderson v. Blood*, 152 N. Y. 285; *Starin v. Kelly*, 88 N. Y. 418.) The reversal by the Appellate Division was a proper exercise of its power. (*Nostrand v. Knight*, 123 N. Y. 614.) The Appellate Division had jurisdiction to review the facts. (*Porter v. Smith*, 107 N. Y. 531; *Watts v. Bd. of Education*, 9 App. Div. 143; *Roberts v. Tobias*, 120 N. Y. 1; *Bloom v. N. S. & L. Co.*, 152 N. Y. 114; *Hart v. Wandle*, 50 N. Y. 381; *S. O. Co. v. A. Ins. Co.*, 79 N. Y. 506; *Ward v. Craig*, 87 N. Y. 550; *Otten v. M. Ry. Co.*, 150 N. Y. 395; *Stiefel v. N. Y. N. Co.*, 12 App. Div. 266; *Martin v. Home Bank*, 160 N. Y. 190.) The Appellate Division, having reversed upon the facts, its order of reversal is not reviewable here. (*Bini v. Smith*, 161 N. Y. 120.) The decision of the trial court did not comply with section 1022 of the Code of Civil Procedure, in that it contained no statement of the grounds upon which the issues were decided; the Appellate Division was, therefore, justified in reversing the judgment entered upon it. (*Hall v. Beston*, 13 App. Div. 116; *Shaffer v. Martin*, 20 App. Div. 304; Baylies on Trial Pr. [2d ed.] 383, 385-387; *McNaughton v. Osgood*, 114 N. Y. 574.)

VANN, J. This was a creditor's action brought to set aside a transfer of personal property from the judgment debtor to the appellants, and the substantial issue was a question of fraud. After hearing witnesses on both sides, the Special Term filed a decision in two sentences, the first of which stated the nature of the action and the second was in these words: "The defendants Caywood and Donovan are entitled

to judgment dismissing the complaint, but without costs." Without filing any exception to this decision, the plaintiff appealed from the judgment entered thereon to the Appellate Division, which not only reversed said judgment "upon questions of fact and of law," but directed final judgment for the plaintiff, setting aside the transfer as fraudulent, requiring the defendants to account for the property covered thereby, appointing a referee to ascertain and report the value thereof, and authorizing the plaintiff upon the coming in of the report to apply at Special Term for further judgment. An interlocutory judgment was entered accordingly, and, when the report of the referee came in, the Special Term confirmed the same, and thereupon final judgment was entered. The defendants appealed to this court from the final judgment, and gave notice of their intention to also review the interlocutory judgment and the order of the Special Term confirming the report of the referee.

The Appellate Division, upon reversing a judgment of the trial court where there was an issue of fact, cannot render final judgment in favor of the appellant, but must grant a new trial unless the facts are conceded, or are established by written instruments, or are found in full by the trial judge, or the evidence is not only undisputed but diverse inferences cannot be drawn therefrom, and it is manifest that no evidence can be produced which will entitle the respondent to recover. (*Heller v. Cohen*, 154 N. Y. 299, 305; *Benedict v. Arnoux*, 154 N. Y. 715, 724; *Snyder v. Seaman*, 157 N. Y. 449, 453; *New v. Village of New Rochelle*, 158 N. Y. 41.) There was a question of fact in this case which did not depend upon documentary evidence, but on conflicting oral testimony. The facts were not found by the trial court, and it is obvious that further evidence relating to the question of fraud might be produced upon a new trial. The judgment of the Appellate Division, therefore, must in any event be so modified as to strike out the part which granted affirmative relief, and, unless that court had power to review the decision of the trial justice, although it was not excepted to, its judgment must be

wholly reversed and that of the Special Term affirmed, for the exceptions taken during the progress of the trial are not entitled to serious consideration.

The decision of the trial justice did not "state separately the facts found and the conclusions of law," nor did it state "concisely the grounds upon which the issues" were "decided," as permitted by section 1022 of the Code of Civil Procedure. Neither the facts nor the grounds of the decision are stated, but merely the nature of the action and the direction for judgment. The judgment entered simply dismissed the complaint, without stating that it was rendered upon the merits, and, as it does not prevent a new action for the relief demanded, is in the nature of a nonsuit. (Code Civ. Pro. § 1209.) The decision seems to be that authorized by section 1021, which states that "the decision of the court, or the report of a referee, upon the trial of a demurrer, or upon the trial of the issues of fact or law, where a nonsuit is granted, must direct the final or interlocutory judgment to be entered thereupon, and in any such case it shall not be necessary for the court or referee to make findings of fact." Although the action was tried upon the merits, witnesses were called on either side, both parties rested, the trial court reserved its decision and wrote an opinion, still the form of the decision and the judgment entered thereon indicate that the issues were not decided upon the merits but that a nonsuit was granted.

But whether the decision was made under section 1021 or 1022 we think that an exception thereto was necessary, in order to enable the Appellate Division to reverse the judgment of the trial court. In 1894 the short form of decision was introduced, and by the same statute which authorized this new method of deciding causes, a new method of getting the case in shape to review was also provided. (L. 1894, ch. 688, § 3.) By the same section a new kind of decision and a new kind of exception to such a decision was authorized, which is independent of that permitted by section 992 or 994, and we have held that the remedy thus provided is exclusive. (*Otten v. Manhattan Ry. Co.*, 150 N. Y. 395, 400.)

If, however, the decision was made under section 1021 no facts were found, and the court is presumed to have held that the evidence, when every permissible inference was drawn therefrom in favor of the plaintiff, did not warrant a judgment for any part of the relief demanded in the complaint. The decision, therefore, was a ruling upon a question of law made after the cause was finally submitted, and according to the sections last cited an exception must be taken thereto in order to present the question to a court of review.

The plaintiff, however, claims that the defendants, by neglecting when before the Appellate Division to specifically raise the objection that no exception had been filed, waived their right to insist upon the defect in this court. The defendants in their brief below called the attention of the court to the fact that "there were no exceptions to the decision of the court and no requests to find." They did not make that fact the subject of a distinct point or make the specific claim that the court had no jurisdiction to review the decision of the trial judge. After discussing the exceptions relating to evidence they stated that the sole question in the case was whether the vendee knew that the vendor intended to defraud her creditors. This was the sole question on the merits, but not the sole question on the appeal, for the defendants had already made a separate point insisting that the exceptions relating to rulings upon the trial were not well taken. There was no reason for alluding to the fact that no exception had been filed to the decision of the court, unless the defendants regarded it as material upon the appeal and wished to insist upon it. Waiver depends upon intention, and we do not think the defendants intended to waive a defect to which they specifically directed the attention of the court, (*Cohn v. Goldman*, 76 N. Y. 284, 287; *Aldridge v. Aldridge*, 120 N. Y. 614.) In thus discussing the question of waiver upon the theory of the respondent, we do not wish to be understood as holding by implication that a waiver may be implied from the failure to raise the point upon the intermediate appeal.

The Appellate Division states in its amended decision that

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Statement of case.

it reversed upon the facts as well as the law, but as a nonsuit was granted no facts were found which could be reversed. If the direction for judgment made by the trial justice, which was a conclusion of law, had been excepted to, the exception would have raised the question whether any reasonable view of the evidence would warrant a recovery by the plaintiff. As no such exception was filed the plaintiff stood before the Appellate Division and now stands before us in the attitude of acquiescing in the decision made by the trial justice. (*Hecla Powder Co. v. Sigua Iron Co.*, 157 N. Y. 437, 441.) The record presents no exception which authorized the Appellate Division to reverse the judgment of the trial court, and we are, therefore, compelled to reverse the judgment appealed from and affirm the judgment rendered in the first instance, with costs.

PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT and MARTIN, JJ., concur. LANDON, J., dissents.

Judgment reversed, etc.

FRANCIS H. TOWNSEND, Appellant, v. MARY VAN BUSKIRK et al., Defendants, Impleaded with JULIA MARY SNELL, Respondent.

APPEAL — NON-REVIEWABLE ORDER. An order and judgment of the Appellate Division reversing an interlocutory judgment and granting a new trial is not reviewable by the Court of Appeals upon the ground that it is an appeal from an order granting a new trial upon a motion made upon exceptions under section 1001 of the Code of Civil Procedure, where the record fails to disclose that the Appellate Division in any way disposed of or decided the exceptions.

Townsend v. Van Buskirk, 22 App. Div. 441, appeal dismissed.

(Argued January 22, 1900; decided March 20, 1900.)

APPEAL from an order and judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 6, 1897, reversing an interlocutory judgment in favor of plaintiff and certain of the defendants,

entered upon a decision of the court on trial at Special Term, and granting a new trial.

This action was brought to partition certain real estate of which one Thomas W. Townsend died seized.

The facts, so far as material, are stated in the opinion.

James C. Foley for appellant.

Rudolph Rabe for respondent.

MARTIN, J. The appeal to this court is from an order and judgment of the Appellate Division which reversed an interlocutory judgment awarding partition and granted a new trial. By the record we also find that the defendants gave notice of motion for a new trial on the exceptions which was served when they appealed from the judgment. Both may have been heard by the Appellate Division at the same time, but if so the record fails to show that fact. We find in the order of reversal no reference to the motion for a new trial, nor any indication that any disposition was made of the exceptions sought to be brought up by the defendants' notice of motion, or that the motion was argued or decided.

While section 190 confers upon this court jurisdiction to review orders granting new trials on exceptions, where the proper stipulation is given, it gives no right of appeal from an interlocutory judgment. Such a judgment can only be reviewed upon an appeal from a final judgment in the manner pointed out by the Code. (*Victory v. Blood*, 93 N. Y. 650; *King v. Barnes*, 107 N. Y. 645.)

In *Tilton v. Vail* (117 N. Y. 520) this court held that in an action for partition it had no jurisdiction to review an interlocutory judgment, even under the special provisions of the Code applicable to those actions. As the record in this case shows that a new trial was granted upon an appeal from an interlocutory judgment without reference to the defendants' motion, that judgment or order cannot be reviewed upon this appeal. But it is insisted that inasmuch as a motion was made for a new trial under the provisions of section 1001 the judgment

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is appealable to this court. Under this section a party may, after entry of the interlocutory judgment, move for a new trial on the exceptions, and from an order granting such a motion an appeal may be taken to the Court of Appeals. (*Raynor v. Raynor*, 94 N. Y. 248; *Kelsey v. Sargent*, 104 N. Y. 663; *Wahl v. Barnum*, 116 N. Y. 87.)

The difficulty in this case lies in the fact that the judgment of the Appellate Division fails to disclose that it in any way disposed of or decided the exceptions which were presented upon the defendants' motion. The order and judgment simply reversed the interlocutory judgment and ordered a new trial.

Moreover, the notice of appeal to this court in no way specified or mentioned any order of the Appellate Division which granted the defendants' motion, but the appeal was only from the order and judgment reversing the interlocutory judgment and granting a new trial.

It is not obvious how it can be said that the Appellate Division granted a new trial upon the defendants' motion under section 1001, and, consequently, that the order is appealable to this court. The most that can be said is that there was an appeal to the Appellate Division from an interlocutory judgment, also that a notice of motion for a new trial on the exceptions was served, and that after hearing the appeal the interlocutory judgment was reversed and a new trial awarded, without overruling or sustaining, or in any way passing upon the exceptions sought to be presented by the defendants' motion under that section.

The appeal to this court was only from that order and judgment, and it cannot be properly held that there is pending in this court an appeal from an order granting a new trial, under the provisions of section 1001. The appeal is from an interlocutory judgment which is not reviewable here.

The appeal should be dismissed, with costs.

PARKER, Ch. J., GRAY, BARTLETT, VANN and WERNER, JJ., concur; CULLEN, J., not sitting.

Appeal dismissed.

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f163	47
f163	507
e163	511
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f164	354
f164	377

JOHN H. SPELLMAN, as Temporary Receiver of the MUEHL-
FELD & HAYNES PIANO COMPANY, Appellant, *v.* JARED J.
LOOSCHEN, Respondent.

CORPORATION — JUDGMENT SUFFERED BY AN OFFICER WITH INTENT TO PREFER A CREDITOR — L. 1892, CH. 688, § 48 — REVIEW OF ORDER OF REVERSAL NOT STATED TO BE UPON THE FACTS. Where, in an action brought by a receiver of a corporation, appointed in proceedings for its dissolution, to set aside a judgment recovered against it, by default, as violative of the provisions of the Stock Corporation Law (L. 1892, ch. 688, § 48), avoiding a judgment suffered by an officer of an insolvent corporation with intent to prefer a creditor, it appears, both from the testimony of the creditor and that of the bookkeeper of the corporation, with its books before him, that, although the creditor had been for a year or more in the invariable habit of selling goods to the corporation on a credit of from two to four months, he sold it goods, as testified to by him and by the president of the corporation, upon the terms of immediate payment, five days before the corporation admitted its insolvency by its petition in the proceedings for a voluntary dissolution, and that, four days thereafter, he recovered, by the consent of the president, and under direction of the attorneys of the corporation in the dissolution proceedings, the judgment in question, a finding by the trial court that the purchase price of the goods was not due when the action was brought, and that both the creditor and the president knew it, should be sustained, and, with other facts in the case, justifies the inference that the judgment was suffered by the president "with the intent of giving a preference over other creditors," and where a reversal by the Appellate Division of said finding and the judgment in favor of plaintiff is not stated to have been made upon the facts, it must be presumed to have been upon the law, and, there being sufficient evidence to sustain the finding, the Court of Appeals may reverse the judgment as founded upon an error of law.

Spellman v. Looschen, 81 App. Div. 94, reversed.

(Argued January 15, 1900; decided March 20, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 18, 1898, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term, and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

N. Y. Rep.] Opinion of the Court, per LANDON, J.

John Delahunty for appellant. The order of the Appellate Division appealed from does not state that the reversal was upon the facts, and, therefore, the presumption required by statute is that it was founded only upon errors of law, and the facts stand approved by that court. (*Petrie v. Trustees of Hamilton College*, 158 N. Y. 458; *Bomeisler v. Forster*, 154 N. Y. 229; Code Civ. Pro. § 1338; *Canda v. Totten*, 157 N. Y. 281.) It is shown by the testimony that the amount for which the action was brought by Looschen was not due at the time of the commencement of the action. (*Lopez v. M. & F. Nat. Bank*, 18 App. Div. 433.) The facts and circumstances make necessary the conclusion that Muehlfeld assisted Looschen in procuring the judgment and facilitated his efforts to procure it hastily, and it is, therefore, void under the Stock Corporation Law. (L. 1892, ch. 688, § 48; *Milbank v. de Riesthal*, 82 Hun, 537; *French v. Andrews*, 145 N. Y. 444; *Lopez v. M. & F. Nat. Bank*, 18 App. Div. 435; *Baker v. Emerson*, 4 App. Div. 348; *Olney v. Baird*, 7 App. Div. 96; *I. W. Co. v. Payne*, 11 N. Y. Supp. 408; *Braem v. M. N. Bank*, 127 N. Y. 508; *Kingsley v. F. Nat. Bank*, 31 Hun, 329.)

Herbert H. Walker for respondent. At the time Looschen began his suit against the Muehlfeld & Haynes Piano Company, on June 4, 1896, the whole of the plaintiff's claim against the company, as set forth in the complaint, was due and payable. (*Beatty v. Clark*, 44 Hun, 126.) The Muehlfeld & Haynes Piano Company did not suffer judgment to be taken against it within the meaning of section 48 of the Stock Corporation Law of 1892 for the purpose of enabling Looschen, by means of a judgment, to obtain a preference over the other creditors. (*Wilson v. City Bank*, 17 Wall. 473; *Milbank v. de Riesthal*, 82 Hun, 537.)

LANDON, J. The Appellate Division did not state in its order that its reversal was upon the facts, and we must, therefore, assume that it was upon the law. The only question of law presented by the record for our review is whether the

learned trial court found, without evidence to support it, any fact material to the judgment.

The action was brought by the plaintiff, the receiver of the Muehlfeld and Haynes Piano Company, to set aside and have declared void a judgment recovered upon default in the City Court of New York, June 9, 1896, by the defendant Looschen against the Muehlfeld and Haynes Piano Company, a domestic corporation, for \$1,008.49.

The complaint alleges that the judgment was obtained in violation of the provisions of section 48 of the Stock Corporation Law, chapter 688, Laws 1892, which provides that "no * * * judgment suffered, * * * by any officer, director or stockholder when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation shall be valid," and adds that "Every transfer or assignment or other act done in violation of the foregoing provisions of this section shall be void."

The trial court found that the judgment in the City Court was so obtained. The summons in that action was served upon the president of the corporation June 4, 1896. Indorsed upon the summons was an order of the chief justice of the City Court limiting the time of the service of the answer to two days. A petition for the voluntary dissolution of the Muehlfeld and Haynes Piano Company, signed by the president and Jack Haynes, two of the three directors of the corporation, verified June 4, 1896, was filed in the county clerk's office of New York June 5, 1896, and the usual order to show cause in said proceedings was made the same day. This exhibit shows the insolvency of the corporation. There is other evidence tending to show it.

The details of the transactions of the 4th of June admit of the finding that the attorneys of the corporation in the insolvency proceedings at the instance of the defendant Looschen and with the consent of its president, directed the proceedings which resulted in the judgment now sought to be set aside.

The trial court found that the sum of \$411, of the amount

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for which the defendant Looschen brought his action and recovered judgment, was not due at the commencement of the action, and that both Looschen and Muehlfeld knew it.

The learned Appellate Division held that this finding was without support in the evidence. We do not concur. The item was for goods sold by the defendant to the corporation May 31, 1896. The defendant had sold the corporation many bills of goods during the year or two of its existence. The bookkeeper of the receiver, with the books of the corporation before him, upon which this and the other sales were entered, testified without objection that the entries invariably showed a credit of from two to four months. The defendant and Muehlfeld testified that the bill of goods for \$411 was sold upon the understanding that payment was to be made immediately in cash or good customers' notes. The defendant testified that his other sales to the corporation were upon a credit of from two to four months. The trial court, who saw the witnesses and heard their testimony, might find that Muehlfeld was discredited by the books of his corporation; and from the defendant's concession as to the credit given upon the other sales, and from the fact that he was a party in interest, that this sale was upon no less credit. The case is stronger against him if we give weight to the testimony of the bookkeeper, to which the defendant did not object.

As the learned Appellate Division did not reverse upon the facts, we must, in view of the evidence, abide by the decision of the trial court. The inference is permissible from this finding in connection with the other findings of fact, that the judgment was suffered by the president of the corporation "with the intent of giving a preference over other creditors of the corporation."

The order of the Appellate Division should be reversed and judgment of the trial court affirmed, with costs.

PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN and VANN, JJ., concur.

Order reversed, etc.

162 272
77 AD 189

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
WILSON E. PAGE, Appellant.

1. EVIDENCE — RAPE — CORROBORATION. The testimony of a female that defendant had committed rape upon her is not corroborated within the meaning of the statute (Penal Code, § 283), by evidence that defendant did not deny her declaration, made out of court, charging him with the crime, when repeated to him by a witness; nor is his admission to another witness that he had "insulted the girl" corroborative evidence when it does not appear when, where or how the insult was given.

2. QUESTION OF LAW. Whether there is any evidence of corroboration is a question of law for the court, and it is error to submit such question to the jury.

People v. Page, 20 App. Div. 637, reversed.

(Argued January 15, 1900; decided March 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered October 5, 1897, affirming a judgment of the Otsego County Court convicting the defendant of the crime of rape in the first degree, and an order denying a motion for a new trial.

The facts, so far as material, are stated in the opinion.

Gibbs & Wilbur for appellant. The trial court erred in refusing to direct an acquittal upon the ground that there was no evidence to support or sustain a conviction. (*People v. Plath*, 100 N. Y. 590.) The girl Etta Hopkins was uncorroborated upon each and every material fact necessary to a conviction. No conviction can be had for rape upon the testimony of the female unsupported by other evidence. (Penal Code, § 283; *People v. Plath*, 100 N. Y. 594; *People v. Terwilliger*, 74 Hun, 310; *Armstrong v. People*, 70 N. Y. 38; *People v. Williams*, 29 Hun, 520.)

Tilley Blakely for respondent. The defendant's motion for a discharge was properly denied. (Penal Code, § 278.) The evidence in corroboration of the prosecutrix, as to the commission of the crime in question upon her, fully satis-

fied the requirements of section 283 of the Penal Code, as construed by the courts. (*People v. Terwilliger*, 74 Hun, 310; *People v. Morris*, 12 N. Y. Supp. 492; *Baccio v. People*, 41 N. Y. 265; *People v. O'Sullivan*, 104 N. Y. 481; *People v. McKeon*, 64 Hun, 504; *Crandall v. People*, 2 Lans. 309; *People v. Grauer*, 12 App. Div. 464; *Barnett v. State*, 83 Ala. 40.)

O'BRIEN, J. The defendant was convicted of the crime of rape committed upon the person of one Etta Hopkins on the 20th day of August, 1895. The complainant was then a girl sixteen years of age or over, and residing with the defendant, who was her guardian. The defendant, his wife and this girl constituted the family and they resided in the country upon a farm. The alleged outrage upon the person of the girl was accomplished, according to her version of the affair, in a most extraordinary manner. The substance of her statement is that on the day referred to, about four o'clock in the afternoon, while in the kitchen with her mistress, the defendant's wife, preparing supper, the defendant, in the presence of his wife, asked her to go with him into the next room and upon her refusal he seized her, dragged her into a small room called the sink room adjoining the kitchen, and with the door leading into the kitchen open and in the presence and hearing of his wife, violated her person notwithstanding her cries and the utmost resistance upon her part. The defendant and his wife were both sworn as witnesses and denied the transaction in general and in all the particulars. The time, place and circumstances attending the commission of the crime as stated by the complainant in her testimony invite attention and compel us to follow the subsequent conduct of the girl and her attitude towards the defendant and his wife. The latter must, of course, have been an accomplice in the crime, if we assume that the version of the transaction given by the complainant is to be taken as true.

The complainant states that after the defendant had accomplished his purpose he passed out of the small sink

room through the open door into the kitchen, where the wife was during the commission of the crime. If the statement of the girl is to be accepted, the participation of the wife in the outrage is perfectly clear, since the former swears that during the struggle she called upon her several times to come to her assistance, and was told to "keep still."

The complainant then states that she remained in the small room after the defendant left her long enough to arrange her clothing, and then came out into the kitchen, where both the defendant and his wife were, and what occurred at this critical juncture can best be stated in her own words: "When I came out I saw Mrs. Page sitting by the table in the kitchen; I did not tell her what he had done; I did not say a word to her about it then; he told me I must not; when I came out and saw Mrs. Page sitting by the table in the kitchen Mr. Page was there; I did not say a word to Mrs. Page about what he had done." In the evening the girl left defendant's house and went to that of one of the neighbors, where she had formerly boarded. She remained there a few days, and then returned to the defendant's house, where she remained four months longer, and so far as appears no reference was made to the transaction until after she left about the end of the year, when another guardian was selected. While the girl was absent from the defendant's house during the few days after the alleged outrage, it appears that she made some disclosures to the woman in whose house in the neighborhood she was stopping, which will be noticed hereafter. The defendant could not have been convicted upon the testimony of the girl "unsupported by other evidence," since the statute so declares (Penal Code, § 283), and the only question presented by this appeal is whether there was any other evidence in the case tending to prove the crime. The rule in such cases is that the corroborative evidence, whether consisting of acts or admissions, must at least be of such a character and quality as tends to prove the guilt of the accused by connecting him with the crime. (Underhill on Criminal Ev. § 74.) The corroboration must extend to every material fact essential

to constitute the crime. (*People v. O'Sullivan*, 104 N. Y. 481; *People v. Kearney*, 110 N. Y. 188; *People v. Plath*, 100 N. Y. 590; *Kenyon v. People*, 26 N. Y. 203.)

At the close of the case for the prosecution the defendant's counsel requested the court to advise the jury to acquit on the ground that the testimony of the prosecutrix was not corroborated. The motion was denied and an exception taken. All the testimony produced to corroborate the complainant was very fairly stated and summed up by the learned trial judge in his charge to the jury as follows: "For the purpose of corroborating the testimony of this girl, the People have called Mrs. McCulloch, who has given evidence tending to show that a short time after the alleged commission of this offense she had a conversation with the defendant, in which she stated to him in effect, as I remember it, that Etta Hopkins had stated to her that he had committed the crime of rape upon her and that she testifies that he did not deny it. It is also proved evidence is given tending to show upon the part of the People that a few days later, in conversation with Mr. Donaldson, the defendant said in his presence that he had insulted the girl. These circumstances which I have referred to are, as I remember it, *all of that evidence which has been adduced by the People, claimed by them tending to show the corroboration of the testimony of this girl.*" Mrs. McCulloch was the woman in whose house the girl remained during the few days after the alleged transaction and to whom it is claimed the girl made the disclosure of the assault upon her. It will be seen that the learned trial judge did not regard the statements of the girl out of court as corroborative of her testimony in court, and obviously in that he was correct. They were the mere declarations of the complainant and were no stronger than her testimony. A witness cannot generally be corroborated by proving declarations made out of court of the same facts testified to in court. In cases of rape disclosures made by the female within a reasonable time after the outrage are admissible as a part of the People's case, and the female may testify when and to whom made and the nature of the dis-

closure. But since the disclosure comes from the complainant herself, directly or indirectly, and depends wholly upon her veracity, it is not "other evidence" in support of her version of the affair within the meaning of the statute. The only significance which the learned trial judge gave to these disclosures was the fact that the defendant did not deny the statement when brought to his attention. So the question is this: A man is informed by a third person that a woman is circulating a story that he had committed rape upon her. He does not take the trouble to deny the story, and, according to the ruling in this case, his omission in that regard is evidence against him to prove that he is guilty of the crime charged. It seems to me that silence under such circumstances is no proof whatever. It might as well be said that a defendant who is charged in open court with the crime, but refuses to speak or plead, remaining silent, thereby furnishes proof of his guilt. So that even if it be true that the defendant remained silent while Mrs. McCulloch told him that the complainant claimed he had committed the crime of rape upon her, that circumstance did not furnish the slightest evidence against him or in the least corroborate the prosecutrix. It cannot be that there is any such anomaly in the criminal law as is involved in the proposition that an accused person, when charged with the offense in open court by indictment, may stand mute without prejudice to his innocence, while the same person is bound to deny neighborhood gossip with respect to his guilt at the peril of furnishing by silence evidence against himself when on trial upon the charge.

But the learned trial judge also reminded the jury, as we have seen, that the defendant had admitted to another witness that he had "insulted the girl." When, where or how the insult was given does not appear, and it is claimed that this vague statement, without any identification of time, place or circumstances, is "other evidence" of guilt in addition to the testimony of the complainant. It needs no argument to prove that it is entirely possible for a man to insult a woman without committing or attempting or intend-

ing to commit the crime of rape. There is no necessary legal connection between an insult and a felony, and an admission of the former does not tend in the least to prove the commission of the latter. The learned trial judge did not hold that either of the two items of proof referred to, namely, the silence of the defendant or the admission of an insult, tended to prove the charge. He left it to the jury to decide whether it did or not. The following is the language of the charge on that point: "If the testimony which has been given tending to corroborate is not believed by you, or if you do not believe that it has the tendency to show the commission of the crime, the fact that the defendant committed the crime, it will be your duty to find a verdict of not guilty, because a conviction cannot be found upon the uncorroborated testimony of the girl." Whether there is any evidence of corroboration in such cases is a question of law for the court, and if the case is submitted to the jury without any legal proof in support of the charge, except that coming directly or indirectly from the complainant herself, a conviction cannot be upheld.

It was incumbent upon the prosecution to prove beyond a reasonable doubt that the defendant violated the person of the girl without her consent, against her will and resistance. (*People v. Dohring*, 59 N. Y. 374; *People v. Connor*, 126 N. Y. 278.) The testimony of the girl alone was not sufficient and there was no other legal evidence as we have seen. "No conviction can be had for * * * rape * * * upon the testimony of the female * * * unsupported by other evidence," is the mandate of the statute. There was no other evidence, and hence the conviction was in violation of the statute.

The judgment should be reversed and a new trial granted.

PARKER, Ch. J., and VANN, J., concur; BARTLETT and MARTIN, JJ., concur in result; HAIGHT, J., dissents; LANDON, J., not sitting.

Judgment reversed, etc.

AMSTERDAM KNITTING COMPANY, Respondent, v. LUTHER L.
DEAN et al., Appellants.

EQUITY — AWARD OF NOMINAL DAMAGES DOES NOT PRECLUDE INJUNCTION AGAINST DIVERSION OF STREAM. The fact that only nominal damages have been awarded to a lower, for the unlawful diversion of a stream by an upper, riparian proprietor, does not preclude a court of equity from forever enjoining the latter from continuing the diversion and compelling him forthwith to restore the stream to its natural course and level, as equity will enjoin an act whose repetition or continuance may become the foundation or evidence of an adverse right, although no damage be shown or found.

Amsterdam Knitting Co. v. Dean, 13 App. Div. 42, affirmed.

(Argued February 9, 1900; decided March 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 15, 1897, affirming a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought to recover damages alleged to have been caused by the erection of an embankment across the west channel of the Chuctanunda creek, in the town of Amsterdam, and to restrain the defendants from maintaining the same.

The facts, so far as material, are stated in the opinion.

W. Barlow Dunlap for appellants. The right to have water flow in its natural channel by a riparian owner only extends to the channel on his own land. An owner above and below him on the stream may divert the stream into a new channel provided he does not affect the flow of the water in its natural channel upon the lands of others. (Lawson on Prop. Rights, 4762; Gould on Waters, 777; *D. D. B. Co. v. Dubuque Co.*, 55 Iowa, 558; *Wallace v. Drew*, 59 Barb. 413; *Jones v. Soulard*, 24 How. [U. S.] 41; *McLamont v. Whitaker*, 3 Rawle, 84; *Gould v. D. B. Co.*, 12 Gray, 442; *Norton v. Valentine*, 14 Vt. 239; *Ford v. Whitbeck*, 27 Vt. 265.) The undisputed facts in this case do not show the diversion of a drop of water or the diversion of a watercourse.

(*Parker v. Griswold*, 17 Conn. 299; Gould on Waters, §§ 214, 410; *Eliot v. F. R. R. Co.*, 10 Cush. 191; *Clinton v. Myers*, 46 N. Y. 517; *Corning v. T. I. & N. Factory*, 40 N. Y. 191; *N. Y. R. Co. v. Rothery*, 132 N. Y. 293; *Avery v. E. W. Co.*, 82 N. Y. 587.)

Edward P. White for respondent. The acts of the defendants created a private nuisance, which the plaintiff was entitled to have removed. (Angell on Watercourses, §§ 90, 93; *Schrivver v. Smith*, 100 N. Y. 471; *Hudson v. Curyl*, 44 N. Y. 553; *Crooker v. Bragg*, 10 Wend. 260.) Under such circumstances, equity will restrain the diversion of a watercourse without proof of pecuniary loss. (Angell on Watercourses, §§ 90, 93, 97, 99, 134; *Schrivver v. Smith*, 100 N. Y. 471, 479; *N. Y. R. Co. v. Rothery*, 132 N. Y. 293; *Townsend v. Bell*, 62 Hun, 306; *Corning v. T. I. & N. Factory*, 40 N. Y. 191.)

O'BRIEN, J. The parties to this action, respectively, own and operate mills upon the same stream or watercourse, the plaintiff being the lower and the defendants the upper proprietors. The plaintiff alleged that some time prior to the commencement of the action the defendants obstructed the stream by constructing an embankment across the natural channel and blasting out the bed of the stream adjoining their own premises, and so diverted the flow of the water from the course in which it was accustomed to flow. The referee found the facts in favor of the plaintiff, and the findings must be regarded as conclusive upon this appeal. There was a finding, however, that the damages sustained by the plaintiff in consequence of the acts complained of were nominal merely. It was decreed by the judgment entered on the report that the diversion of the stream in the manner found was unlawful as against the plaintiff and in violation of its right to have the water of the stream flow through its natural channel, and the defendants were forever enjoined and restrained from continuing the obstruction and diversion, and ordered to

remove the embankment described forthwith and to restore the stream to its natural course and level.

The contention of the learned counsel for the defendants is, that upon the findings the equitable relief granted was unauthorized and erroneous as matter of law. The only basis for this proposition is, that since the referee found that there was no substantial damage to the plaintiff, there was no power in the court to direct the removal of the obstruction or the restoration of the stream to its former condition. This contention cannot be sustained. It seems to be well settled that in such cases, where the act complained of is such that by its repetition or continuance it may become the foundation or evidence of an adverse right, a court of equity will interpose by injunction, though no actual damage is shown or found. (*Smith v. City of Rochester*, 104 N. Y. 674; *Webb v. Portland Mfg. Co.*, 3 Sum. 189; *Corning v. Troy Iron and Nail Factory*, 40 N. Y. 191; Gould on Waters, § 13; Angell on Watercourses, § 449.)

Where the lands of the party complaining of such a diversion of running water includes either the whole or a part of the natural channel, equity will enjoin the continuance of the unlawful act of the owner above and interfere by mandatory injunction to restore the stream to its original condition. The circumstance that the plaintiff in such a case has shown no actual damage, is no answer to his application to have the water restored to its natural course. The case was correctly decided below, after a very full consideration of the law and the facts, and there is no ground upon which this court can properly interfere with the judgment, and it must, therefore, be affirmed, with costs.

PARKER, Ch. J., GRAY, HAIGHT, CULLEN and WERNER, JJ., concur; LONDON, J., not sitting.

Judgment affirmed.

WILLIAM R. WARE, Appellant, v. BENJAMIN F. DOS PASSOS
et al., Respondents.

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1. APPEAL — REVIEW OF NONSUIT. A judgment dismissing a complaint, on the ground that plaintiff had failed to make out a cause of action, entered without a decision of the trial court upon the facts established at the trial, is a judgment upon a nonsuit, and may be reviewed in the Court of Appeals.

2. ACTION FOR BROKER'S COMMISSIONS — EVIDENCE PRECLUDING NONSUIT. Proof that the defendant, a lawyer, admitted to the plaintiff, a broker, that he considered the plaintiff to be the "procuring cause" of the sale of defendant's real estate, is evidence supporting the plaintiff's cause of action, and a judgment entered upon a nonsuit in an action brought by the broker to recover commissions must be reversed.

Ware v. Dos Passos, 13 App. Div. 625, reversed.

(Argued February 7, 1900; decided March 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 8, 1897, affirming a judgment in favor of defendants entered upon a verdict, and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Arnold Charles Weil and *Robert Weil* for appellant. There was evidence from which a jury might have found that the plaintiff procured the purchaser. (*Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378; *Lyon v. Mitchell*, 36 N. Y. 235; *Lloyd v. Matthews*, 51 N. Y. 124; *Wylie v. M. Nat. Bank*, 61 N. Y. 415; *Smith v. McGovern*, 65 N. Y. 574; *Sussdorff v. Schmidt*, 55 N. Y. 319; *Mansell v. Clements*, L. R. [9 C. P.] 139.)

Samuel G. Adams for respondents. The plaintiff has failed to prove that he was the procuring cause of the sale. (*Gerd- ing v. Haskin*, 141 N. Y. 519; *Wylie v. M. Nat. Bank*, 61 N. Y. 415; *Martin v. Bliss*, 57 Hun, 159; *Smith v.*

McGovern, 65 N. Y. 574; *Baker v. Thomas*, 12 Misc. Rep. 432; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378.) The affirmance of the judgment appealed from having been unanimous this court can only inquire if an error of law has been committed. It cannot inquire as to the facts. (Code Civ. Pro. § 191.)

HAIGHT, J. This action was brought to recover a broker's commissions claimed to have been earned by the plaintiff in procuring a purchaser of the defendants' real estate on Fulton street in the city of New York.

Upon the first trial of this action a judgment was rendered in favor of the plaintiff, but it was reversed by the Appellate Division and a new trial ordered. Upon the new trial the complaint was dismissed and a judgment entered in favor of the defendants, which has been unanimously affirmed by the Appellate Division. If the trial court found the facts established by the evidence in favor of the defendants and upon such findings dismissed the complaint upon the merits, no review under the Constitution could be had in this court. If, however, as the appellant contends, the trial resulted in a nonsuit, the appellant is entitled to succeed upon this appeal if there was some evidence supporting his cause of action. (*Scofield v. Hernandez*, 47 N. Y. 313; *Place v. Hayward*, 117 N. Y. 487.)

Upon referring to the record we find that the trial took place before a judge without a jury upon the stipulation that the evidence should be the same as that taken upon the former trial and read from the printed case on appeal, and if the court found for the plaintiff it should award to him one thousand and twelve dollars and fifty cents (\$1,012.50), that being one per cent on the purchase price and the usual broker's commissions, with interest from March 11, 1893. Following the stipulation is a motion by defendants' attorney to dismiss the complaint on the ground that the plaintiff had failed to make out a cause of action. The motion was granted and an exception was taken by the plaintiff.

This appears to be the entire record of the trial upon which the judgment in this case was entered.

There is no verdict of a jury, report of a referee, or decision of a court upon which a judgment could be entered. A decision of a court upon the trial of an issue of fact or of law must be in writing, signed by the trial judge, and must state separately the facts found and the conclusions of law, or must state concisely the grounds upon which the issues have been decided and direct the judgment to be entered thereon. The decision must be filed with the clerk and made a part of the judgment roll. (Code Civ. Pro. §§ 1010 and 1022; *Wood v. Lary*, 124 N. Y. 83; *Gilman v. Prentice*, 132 N. Y. 488; *Ruabe v. Squier*, 148 N. Y. 81, 84; *MacNaughton v. Osgood*, 114 N. Y. 574.) It is, therefore, apparent that no judgment upon the merits is before us for review. In case of a nonsuit no findings of fact are required (Code Civ. Pro. sec. 1021), and in view of the condition of the record and the admission of counsel upon the argument we think we must, under the circumstances, treat the judgment as entered upon a nonsuit.

Was there evidence supporting the plaintiff's cause of action? We think the question must be answered in the affirmative. Inasmuch as there must be a new trial, we do not deem it necessary or advisable to enter upon an elaborate discussion of the evidence. When the testimony comes to be considered by a jury, or by a judge who is to determine the facts, some of the plaintiff's evidence may be disbelieved. It is not the province of this court to determine the facts. We are called upon only to determine whether there is any evidence upon which a finding in favor of the plaintiff could be based. Upon this question we think it necessary only to call attention to one item of evidence given by the plaintiff, and that is his testimony of the admission of the defendant Dos Passos, to the effect that he considered the plaintiff to be what the law denominated "the procuring cause." As we have seen, this action was brought to recover broker's commissions in procuring a purchaser of the defendants' real estate. The defendant Dos Passos was a lawyer, and, therefore, fully

understood the meaning of the term "the procuring cause" as applied to claims of this character. It was, in effect, an admission that the plaintiff had procured a purchaser, and consequently had earned his commissions. (*Smith v. McGovern*, 65 N. Y. 574; *Wylie v. Marine National Bank*, 61 N. Y. 415.)

The judgment should be reversed and a new trial ordered, with costs to abide the event.

PARKER, Ch. J., O'BRIEN, LANDON, CULLEN and WERNER, JJ., concur; GRAY, J., not voting.

Judgment reversed, etc.

162 284
162 555
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GEORGIANA HICKS, Respondent, v. BRITISH AMERICA ASSURANCE COMPANY, Appellant.

1. FIRE INSURANCE—ORAL CONTRACT FOR INSURANCE HAS LEGAL EFFECT OF STANDARD POLICY. Where a local agent of a fire insurance company, after a conversation with an applicant for insurance, in which the sum for which the property was to be insured, the premium and period of insurance were discussed and fixed, stated to applicant that "You are insured from noon on the 30th day of December, 1893, to noon of December 30th, 1894," a complete and binding agreement for insurance for the period named is created, and the law reads into the contract the standard fire insurance policy of the state of New York, whether it was referred to in terms or not.

2. PROOFS OF LOSS MUST BE SERVED UNDER SUCH CONTRACT. In an action brought upon such contract to recover for damages caused by fire, the plaintiff must, after proving the contract and loss by fire, show compliance with the requirements of the standard policy and prove service of proofs of loss or a waiver thereof by the defendant; and the charge of the trial court that, as matter of law, it was not necessary for the plaintiff to present to the defendant such proofs of loss, is an error of law for which a judgment for the plaintiff must be reversed.

3. FAILURE TO DELIVER POLICY—NOT GROUND FOR RECOVERY. Where such action has been brought, tried and decided upon the theory that such contract was a completed contract for present insurance, a judgment for plaintiff cannot be affirmed upon the ground that plaintiff sustained damages because defendant had failed to deliver to plaintiff written evidence of the contract, i. e., a policy of insurance, and that, therefore, it was unnecessary for plaintiff to give notice of the fire and present proofs of loss, as required by the standard policy.

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Statement of case.

4. PROOFS OF LOSS NOT WAIVED BY ACTS OF AGENT OR DENIALS IN ANSWER. An implied waiver of the service of proofs of loss cannot be inferred from the failure of the local agent to deliver the policy, or from his testimony on the trial denying that he ever made a contract to insure the premises; nor does the insurer's denial, by its answer, of the allegations of the complaint constitute a waiver, the insured having made no claim prior to the commencement of the action that the building was insured by the defendant.

Hicks v. British America Assur. Co., 13 App. Div. 444, reversed.

(Argued February 5, 1900; decided March 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered February 8, 1897, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

This action was brought to recover on an alleged oral contract to insure a certain building in the village of Penn Yan, entered into between George C. Hicks, the plaintiff's assignor, and Melmoth Hobart, the agent of the defendant.

The facts, so far as material, are stated in the opinion.

A. H. Sawyer for appellant. Hobart, the agent of the defendant, had no power to make a parol contract of insurance binding upon defendant. The most that he could do was to make a parol preliminary contract to issue a policy with the usual terms and conditions in such policy. (*Angell v. H. F. Ins. Co.*, 59 N. Y. 171; *Ellis v. A. C. Fire Ins. Co.*, 50 N. Y. 402; *Van Loan v. F. M. F. Ins. Assn.*, 90 N. Y. 280; *Hubbell v. P. M. Ins. Co.*, 100 N. Y. 41; *Lipman v. N. F. Ins. Co.*, 121 N. Y. 454; *Karelsen v. S. F. Office*, 122 N. Y. 545.) The refusal of the trial court to grant the defendant's motion for a nonsuit at the close of the plaintiff's case, upon the ground that there had been no service of notice or proofs of loss, was error. (*Quinlan v. P. W. Ins. Co.*, 133 N. Y. 356; *Sergeant v. L. & L. & G. Ins. Co.*, 85 Hun, 31.) Under no circumstance could the assured be relieved from the necessity of giving immediate notice of the loss and service of sworn proofs within sixty days, unless the defendant, with full

knowledge of all the facts, had repudiated the alleged contract and refused to pay any loss thereunder; and the charge of the court that if the agent claimed after the fire that no contract of insurance had been made, that was a waiver of notice and proofs of loss, was error. (*Bush v. W. F. Ins. Co.*, 63 N. Y. 531; *Van Allen v. F. J. S. Ins. Co.*, 64 N. Y. 469; *Blossom v. L. F. Ins. Co.*, 64 N. Y. 162; *Quinlan v. P. W. Ins. Co.*, 133 N. Y. 356; *Smith v. N. Ins. Co.*, 60 Vt. 682; *De Grove v. M. Ins. Co.*, 61 N. Y. 594; *Taylor v. M. F. Ins. Co.*, 9 How. [U. S.] 390; *Grattan v. M. L. Ins. Co.*, 80 N. Y. 281; *Boyd v. C. R. Ins. Co.*, 70 Iowa, 325.) The evidence upon the part of the plaintiff did not authorize a jury to find a refusal on the part of Hobart to issue a policy or pay the loss, sufficient to relieve Hicks from the necessity of giving notice and making proof of loss, even had Hobart been authorized to bind the defendant by such refusal. (*Shank v. G. F. Ins. Co.*, 4 App. Div. 522.) The trial court erred in refusing to receive evidence that defendant had given special instructions to Hobart not to write any insurance upon the property of Hicks. (*S. Ins. Co. v. Jamieson*, 79 Iowa, 245; *Lawson on Presumptive Ev.* 53, 60; *Bank of U. S. v. Dandridge*, 12 Wheat. 64; *Hartwell v. Root*, 19 Johns. 345.)

John A. Barhite for respondent. Hobart, the agent of the defendant, had authority to make a contract to issue a policy, and such contract was binding upon the defendant. (*McMaster v. State*, 108 N. Y. 542; *Zichen v. Smith*, 148 N. Y. 558; *Ellis v. A. C. F. Ins. Co.*, 50 N. Y. 402; *Angell v. H. F. Ins. Co.*, 59 N. Y. 171; *Van Loan v. F. M. F. Ins. Assn.*, 90 N. Y. 280; *Manchester v. G. Assur. Co.*, 151 N. Y. 88; *Hubbell v. P. M. Ins. Co.*, 100 N. Y. 41; *De Grove v. M. Ins. Co.*, 61 N. Y. 594; *Ruggles v. A. C. Ins. Co.*, 114 N. Y. 415; *Quinlan v. P. W. Ins. Co.*, 133 N. Y. 356.) The refusal of the court to nonsuit the plaintiff upon the ground that there had been no service of notice or proofs of loss was correct. (*Shaw v. R. L. Ins. Co.*, 69 N. Y. 286; *Young v. Hunter*, 6 N. Y. 203; *Robinson v. Frank*, 107 N. Y. 655;

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Taylor v. M. F. Ins. Co., 9 How. [U. S.] 390; *Boyd v. C. R. Ins. Co.*, 70 Iowa, 325; *Grattan v. M. L. Ins. Co.*, 80 N. Y. 281.) The evidence in the case was sufficient to authorize the jury to find that Hobart refused to issue a policy and repudiated his agreement. (*Szuchy v. H. C. & I. Co.*, 150 N. Y. 219; *People ex rel. v. Barker*, 152 N. Y. 417; *S. L. Ins. Co. v. McCain*, 96 U. S. 84; *Stilwell v. M. L. Ins. Co.*, 72 N. Y. 392; *Hyatt v. Clark*, 118 N. Y. 563.) The trial court did not err in refusing to receive evidence that defendant had given special instructions to Hobart not to write any insurance upon the property of Hicks. (*Ruggles v. A. C. Ins. Co.*, 114 N. Y. 415; *S. Ins. Co. v. Jamieson*, 79 Iowa, 245; *Walsh v. H. F. Ins. Co.*, 73 N. Y. 5.) The evidence was submitted to the jury in a clear and impartial charge without error. (*McGinley v. U. S. L. Ins. Co.*, 77 N. Y. 495; *Booth v. B. & A. R. R. Co.*, 73 N. Y. 38; *Mussoth v. D. & H. C. Co.*, 64 N. Y. 524; *Hoffman v. N. Y. C. & H. R. R. Co.*, 87 N. Y. 25; *De Grove v. M. Ins. Co.*, 61 N. Y. 594; *Priebe v. K. B. Co.*, 77 N. Y. 597; *Carroll v. C. O. Ins. Co.*, 40 Barb. 292; *Post v. A. Ins. Co.*, 43 Barb. 351; *Pitney v. G. F. Ins. Co.*, 65 N. Y. 6; *Ruggles v. A. C. Ins. Co.*, 114 N. Y. 415.)

PARKER, Ch. J. We are agreed that the verdict of the jury establishes that on the 30th day of December, 1893, defendant's agent Hobart had a conversation with Colonel Hicks, plaintiff's assignor, the legal effect of which was to create a contract of present insurance in the sum of \$2,500.00 upon property of Colonel Hicks, which was consumed by fire two days later. The agreement that the contract was one of present insurance accords with the allegations of the complaint, the theory of the counsel as shown by their method of trial and the charge of the court. That position cannot be attacked from any source, for either that which was said operated to create a contract of present insurance, or else no contract was ever made binding upon the defendant. The evidence tended to show a contract to insure, and nothing

else. It is not pretended that a contract of any kind between these parties was made after the conversation of December 30th. The jury have found that the defendant's agent said to Hicks, after a general discussion on the subject of insuring the property, "you are insured from noon on the 30th day of December, 1893, to noon of December 30th, 1894." The legal effect of this answer to the application for insurance made by Col. Hicks was to create a complete, binding agreement for insurance for the period named, upon which he was entitled to recover for the damages sustained by the fire had he made performance on his part. (*Ruggles v. American Central Ins. Co. of St. Louis*, 114 N. Y. 415.) This contract of insurance, although verbal, embraced within it the provisions of the standard policy of fire insurance, which the legislature in its wisdom formulated for the protection of both insured and insurer. It is usual for the company to issue a policy of insurance evidencing the contract between the parties; but the policy accomplishes nothing more than that, for when the contract is entered into between the agent and the owner, whether the binder be verbal or in writing, it includes within it the standard form of policy and the contract is a completed one. (*Ruggles Case, supra*; *Lipman v. N. F. Ins. Co.*, 121 N. Y. 454; *Karelsen v. Sun Fire Office*, 122 N. Y. 545; *Underwood v. Greenwich Ins. Co.*, 161 N. Y. 413.) In the three cases last cited the binder had been reduced to writing; but there is no distinction whatever in principle between those cases and the one at bar, for in each there is a binding contract to insure, and necessarily according to the only form of insurance contract authorized by the laws of this state. The law reads into the contract the standard policy, whether it be referred to in terms or not. In *Lipman's Case (supra)* Judge ANDREWS, in speaking of the construction to be put upon the binding slip issued in that case, said: "The construction is, we think, the same as though it had expressed that the present insurance was under the terms of the usual policy of the company to be thereafter delivered." And in *Karelsen's* case the court said: "While the binding slip contained none

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of the conditions usually found in insurance policies, the contract evidenced by it was the ordinary policy of insurance issued by the company. So that, in any construction of the contract, it must be regarded as though it had expressed that the present insurance was under the terms of the usual policy of the company to be thereafter delivered." So that all this plaintiff had to do in order to recover in this action, aside from showing a loss by fire and compliance on her part with the conditions of the contract, was to prove the making of the contract. This was accomplished by proving the conversation between her assignor and the agent; for the conversation disclosed the sum for which the property was to be insured, the amount of premiums and the period of insurance, and the statute provided for all of the other conditions of the contract of insurance. Neither party to it had the right to add to, or take from, the requirements of the legislature in that regard. The making of the contract the plaintiff proved to the satisfaction of the jury, and she did not attempt to prove anything more. This the trial court, as well as the counsel, understood, and the case was tried upon that theory. It has been discovered in this court, however, that the judgment against the defendant cannot be sustained if this action be now treated in accordance with the theory that induced its commencement and upon which it was tried, namely, that the plaintiff's assignor made a valid contract of insurance with the defendant by virtue of which this plaintiff, as assignee, is entitled to recover to the extent provided for by the policy for the damages sustained by her through the destruction by fire of the building insured. The error which calls for a reversal of the judgment, if this be treated as an action on the contract, lies in the trial court's charge to the jury, in effect, that, as matter of law, it was not necessary for the insured to present to the defendant proofs of loss in accordance with the requirements of the standard policy. To avoid this result it is proposed in the dissenting opinions not only to set at naught the many decisions of this court, holding that on an appeal a case must be disposed of

upon the theory upon which it was tried (*Snider v. Snider*, 160 N. Y. 151; *Stephens v. Meriden Britannia Co.*, 160 N. Y. 178; *People ex rel. Warschauer v. Dalton*, 159 N. Y. 235; *Drucker v. Manhattan Ry. Co.*, 106 N. Y. 157; *Baird v. Mayor, etc.*, 96 N. Y. 567), but, also, to decide that growing out of this contract the plaintiff had another cause of action, the maintenance of which did not require the service of proofs of loss. Hence, it is claimed that, by treating the case as having been tried upon that theory, the court may avoid reversing the judgment, for in such a case it would have been unnecessary to charge that the service of proofs of loss was essential to recovery. This newly-discovered cause of action is said to spring out of the promise made at the time the contract was entered into, that the defendant would deliver to the insured evidence of the contract in the shape of a policy of insurance. The contract was completed at the moment the agent said, "you are insured from noon on the 30th day of December, 1893, to noon on the 30th day of December, 1894" (*Ruggles v. Amer. C. Ins. Co.*, *supra*), and it is agreed by every member of this court that the defendant is liable to the plaintiff on the contract thus made in the full amount of the policy, if the damage was sustained in the manner referred to in the policy, and plaintiff performed the conditions imposed upon him by it. But it is said that he may recover either on the contract, or, instead, if he elects, on the ground that the defendant failed to deliver to him written evidence of the contract, *i. e.*, a policy of insurance.

If the case were one where the written evidence of the contract had to come into the possession of the plaintiff before recovery could be had thereon, then it is true that an action in equity might be brought, praying for a delivery of the policy that the defendant withheld, and further demanding that upon the policy delivered in pursuance of the decree the plaintiff should have judgment in the amount specified in the policy for her damages by fire, and even then the plaintiff would have to abide by the terms of the policy, delivery of which the judgment should decree. But that is not this case at all.

To enable her to recover it was not necessary for this plaintiff to have physical possession of the policy which the agent promised to give her assignor. (*Ruggles Case, supra.*) Her action was not founded upon a policy, but upon the contract of insurance made upon the 30th day of December, which, as both parties agreed, was to begin at noon on that day, no matter when the policy, which the parties intended should furnish evidence of the contract, should be delivered. The action was brought, tried and decided upon that theory, and no one disputes that the judgment could in this court stand upon that theory had the trial court charged the jury correctly in relation to the necessity of serving proofs of loss. It is apparent, therefore, that the plaintiff sustained no damage by reason of the defendant's failure to furnish her assignor with written evidence of the contract. Had the promise been kept, the plaintiff might not have been obliged to call her assignor to prove the contract, thus subjecting him, as it turned out, to be confronted with impeaching testimony; but neither the plaintiff nor her assignor was otherwise damaged, for he found no difficulty in proving a contract to the satisfaction of the jury. The possession of the promised policy, therefore, would have been a convenience possibly, but nothing more.

Plainly, therefore, it is not true that the plaintiff suffered damage in the amount of the contract of insurance by reason of the failure of the defendant to deliver a policy reciting the terms of the contract entered into, and hence the judgment cannot be affirmed on the ground that the plaintiff sustained damages in the sum of \$2,500.00, because the defendant omitted to deliver a policy. Nor do I think that a sound public policy would sanction the creation of such a precedent even if a legal principle could be found upon which to rest it.

The legislature of the state of New York has prescribed a standard form of policy for the protection of both insurer and insured. It contains provisions specially protecting the insured from harsh methods by insurance companies. On the other hand, it provides that which experience has shown to

be necessary in order to protect insurance companies from being victimized through fraud, and among the conditions which the legislature in its wisdom has caused to be incorporated into the standard policy is one making it necessary that the insurer shall have immediate notice of the facts and circumstances of the fire; another that within sixty days the owner shall present proofs of loss, duly verified, in which shall be stated the circumstances of the fire and the value of the property destroyed and various other things which it is deemed important that insurance companies should know before being called upon to adjust a loss; still another provides that no local agent shall have the power to waive any of these written conditions, except by a writing. It is unnecessary to present the reasons which induced the legislature to require these conditions precedent to a recovery upon a policy of insurance; it is sufficient for our purpose that the legislature declared that it should be so, and we should see to it that the general trend of our decisions is towards the enforcement of the legislative command instead of its nullification. This plaintiff had the right, as it is conceded on all hands, to recover on the contract of insurance which her assignor made with the defendant's agent, whether a policy was subsequently delivered to him or not; but as the standard policy was necessarily a part of the contract, he should be required to comply with the conditions of that policy and give notice of the facts and circumstances of the fire and present proofs of loss duly verified. The view taken by some of my brethren, however, is that it was unnecessary to give notice of the fire and present proofs of loss within sixty days, or at any other time, because, it is said, such an action need not be treated as on a contract of insurance, but on a contract to give a policy, which has not been carried out, and, therefore, prior to beginning suit, which may be done at any time within six years instead of one year, as provided in the standard policy, the insured has nothing whatever to do when he sustains a loss by fire but lie by until, as in this case, several months have passed, or, in some other case, until years

have gone by, without giving the company notice of the fire or any proofs of loss whatever; he may then bring a suit claiming that two days, or less or more, before the fire, the defendant's local agent, without receiving any premium, agreed to, but did not, issue a policy, for which defendant is liable to plaintiff in the amount of the sum for which it was agreed that the policy should issue. If such a procedure should be sanctioned by this court, then might an insurance company be mulcted in damages without having had an opportunity to investigate promptly the origin of the fire and the value of the thing destroyed, and thus would the door be opened wide for the perpetration of fraud.

It is said that if the foregoing argument seems not to be defective upon its mere reading, it is nevertheless so because it leaves out of consideration the decisions of this court in *Ellis v. Albany City Fire Insurance Co.* (50 N. Y. 402); *Angell v. Hartford Fire Insurance Co.* (59 N. Y. 171); *Van Loan v. Farmers' Mutual Fire Insurance Assn.* (90 N. Y. 280). But the situation which those cases were designed to meet no longer exists. During the period of time in which they and others were decided, and down to the year 1886, each insurance company was at liberty to insert such provisions in the policy of insurance issued by it as it deemed best. The result was that there was no uniformity in policies of insurance, and when loss by fire occurred, prior to a delivery of the policy, it became necessary for the assured to secure possession of the policy, either by its voluntary delivery to him by the officers of the company, or in pursuance of a decree in a suit in equity for specific performance; thereon he could found a judgment for the damages sustained by the fire, or he was allowed to recover the damages sustained for a breach of the contract, which was treated as a contract for the delivery of a policy. The last one of the cases cited was decided in 1882; four years later the legislature, by chapter 488 of the Laws of 1886, enacted and provided for a uniform policy of fire insurance, to be made and issued in this state, by all insurance companies taking fire risks on property within this state,

to be known and designated as the "Standard Fire Insurance Policy of the State of New York." Upon the passage of this important legislation the policy of insurance was no longer of special moment except as evidence that a contract to insure had been made; for it was no longer competent for the parties to incorporate into the policy any provisions whatever, outside of those embraced within the terms of the standard policy, and thereafter the contract to insure was by common consent of the profession and the courts scientifically treated as a contract of insurance, and not, as formerly, a contract to issue a policy, as an examination of the authorities in this court from the *Ruggles* case down will show.

It is suggested that an affirmance of the judgment might also be placed on the ground that while the action was brought upon the contract of insurance, it was made to appear upon the trial that the defendant by its conduct waived service of proofs of loss and, hence, that it was not error for the court to charge in effect that the plaintiff could recover without showing that she had complied with the terms of the contract in that respect. If the defendant had by its conduct rendered unnecessary the service of proofs of loss the contention would, of course, be well founded. But it had to do something in order to lose the benefit of the stipulations in its contract. At the outset it should be said that the defendant or its officers never did anything whatever until after this action was commenced. Neither the plaintiff nor her assignor, so far as this record discloses, ever addressed any letter or other communication to the defendant or any of its officers prior to the commencement of this action. What then is the alleged waiver founded upon? Why upon the action of the local agent who made the contract of insurance in denying that he ever made such a contract. An unstable and worthless foundation surely in view of the fact that under the standard policy an agent is without power to waive any of the conditions, as this court has time and again held. (*Van Allen v. Farmers' Joint Stock Ins. Co.*, 64 N. Y. 469; *Quinlan v. Providence Washington Ins. Co.*, 133 N. Y. 356; *Bush v. Westchester Fire Ins. Co.*,

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63 N. Y. 531 ; *De Groves v. Metropolitan Ins. Co.*, 61 N. Y. 594.) While it is conceded that the local agent had no power in such a case to waive the condition regarding proofs of loss, yet it is contended that he did in fact waive it by omitting to deliver the policy when called for by the owner of the building after the fire, and by denying that he had ever made a contract to insure. Stating the contention in other words, it is that if the agent had tried to waive the conditions of the policy and had promised to do so, he could not have accomplished it, but that by omitting either to do or to say a particular thing he did waive the condition, which is to say that an express waiver would not be effectual, but an implied one would.

As the statement of the proposition seems to furnish the answer to it, I pass on to such of the defendant's acts as are relied upon to constitute a waiver. It is not pretended that prior to the commencement of this action the plaintiff or her assignor ever notified the defendant company that she claimed that the company had insured the burned building, so there is nothing before action brought upon which to base a claim that the defendant waived proofs of loss. But it is said that when the suit was brought and the defendant by its answer denied the allegations of the complaint, it in some way made good the attempted waiver of the agent, although it was absolutely void before. The answer is that if the plaintiff had not a complete cause of action against the defendant when the summons was served, no obstacles have been removed from her path by the denials in the defendant's answer of the allegations of her complaint. If a party has not a good cause of action before commencing suit, it is safe to say that he will not get one by an answer of the defendant which contents itself with denying the existence of the facts alleged in the complaint. It is plain, therefore, that the plaintiff is without a basis for a recovery upon this cause of action, if a new trial be granted, because neither she nor her father, the assignor, have presented to the defendant any proofs of loss, nor was service of proofs of loss waived by the defendant; and while such a

result may or may not be in the interest of justice, in this particular case there can be no doubt that the measure of injustice done, if any, will be far less than would necessarily ensue from a decision putting a premium upon insurance obtained without a policy, by making it possible to recover for the damages sustained through a fire, by an action commenced at any time before the six years' Statute of Limitations shall have run, and that too without giving the company notice of the fire or serving it with proofs of the loss, thereby preventing it from being able to inquire about the facts and circumstances attending the fire until months or years after the happening of it. This would in many cases effectually prevent the company from acquiring any information whatever.

It follows, if the views expressed be sound, that the action is upon a contract of insurance and not one for damages resulting from a failure to deliver a policy, and, hence, that proofs of loss were necessary in the absence of a waiver thereof by the defendant, of which there is no proof, and the failure to so charge was error, calling for a reversal of the judgment.

The judgment should be reversed.

LANDON, J. (dissenting). We have no jurisdiction to inquire whether there was any evidence tending to support the verdict, but must limit our review to the alleged errors of law which, if found to be well assigned, may possibly have misled the jury.

The complaint may be construed as seeking either a recovery of damages for the breach of a contract to issue a policy of insurance, or to enforce its delivery and to recover thereon as if actually delivered. Two questions of law are presented by the defendant's exceptions; one respecting the omission to serve proofs of loss, and the other, the exclusion of evidence.

The following facts were established by the verdict: On the 30th of December, 1893, George C. Hicks, the plaintiff's assignor, was the owner of a malt house in the village of Seneca Falls, upon which was other insurance. He applied

on the evening of that day to Melmoth Hobart, who was the local agent of several insurance companies, including the defendant. He was authorized by the defendant to make agreements for policies of insurance and to issue policies therefor of the form of the standard policy of the state of New York. He was furnished by the defendant with blanks for the purpose, which he was authorized to fill, and, by counter-signing and delivering, to make completed obligations of the defendant. Hobart agreed to issue to Hicks two policies of insurance upon the malt house, each for \$2,500, one by the defendant and the other by a Westchester company, each for one year from noon of that day, for the premium of \$31.25 for each policy. Hicks offered to pay the premiums then, but Hobart said that he need not do so until he should deliver him the policies, which he would not do that evening, as he wished to see a policy issued upon the malt house by the agent of the other companies, in order to make his description of the property identical with that in the other policies, but would attend to the matter the next day. He then said to Hicks, "You are insured from noon on the 30th day of December, 1893, to noon on the 30th day of December, 1894." The next day was Sunday, and Monday following was a holiday, and Hobart did not make out the policies. Early in the morning of Tuesday, January 2, 1894, the malt house was destroyed by fire. The loss was great enough to equal the amount of all the other insurance and that here in question. The day after the fire Hicks tendered to Hobart the premiums and demanded the policies. Hobart refused to take the tender, and also refused to issue the policies. Hicks also demanded blank proofs of loss. Hobart refused to give him any, saying that he would not say whether he would receive the money for the premium or refuse it; that he had no blank proofs of loss; that he could do nothing about the matter; that he had written to his companies, and that, upon getting notice from them, he would let Hicks know; that he could give no definite answer in reference to the policies until he heard from his companies. Hicks then said, "We may

take it as conclusive that you will not receive the money," and Hobart made no reply. No further communication took place. No proofs of loss were served. This action was brought seven months after the fire. The oral contract was complete in all its details, and Hicks was entitled to the policy. (*Ellis v. Albany City Fire Ins. Co.*, 50 N. Y. 402; *Angell v. Hartford Fire Ins. Co.*, 59 N. Y. 171; *Van Loan v. Farmers' M. Fire Ins. Assn.*, 90 N. Y. 281; *Ruggles v. Am. Cent. Ins. Co.*, 114 N. Y. 415.)

The standard policy of the state of New York, which was the form of policy the defendant agreed to issue, requires the insured to furnish the insurer proofs of loss within sixty days of the fire. The court charged the jury: "I charge you, as a matter of law, if you find from the evidence that a contract was made to issue a policy, and when Mr. Hicks called upon the agent and tendered him \$62.50 and demanded his insurance policy, the agent refused to give it to him or to pay the loss, upon the ground that the company was not liable, because it had not agreed to issue a policy, then that was a waiver of proofs of loss on the part of the insurance company." To this the counsel for the defendant excepted, whereupon the court said, "That if the agent claimed that the contract was not made, it was not necessary for the plaintiff or Mr. Hicks to furnish any proofs of loss." To this the defendant excepted, and asked the court to charge the jury that Hobart, as the local agent of the defendant, had no power to waive the condition of the contract of insurance requiring proofs of loss. The court refused and defendant's counsel excepted. The standard policy provides that no agent of the company shall have power to waive any provision or condition of the policy, except such as by the terms of the policy may be the subject of agreement indorsed upon or added to it, and in every such case the waiver must be in writing, indorsed upon or annexed to the policy.

Treating the case as if under the policy, Hobart had no power to waive the proofs of loss. (*Van Allen v. Farmers' J. S. Ins. Co.*, 64 N. Y. 469; *Quinlan v. Prov. Wash. Ins. Co.*,

133 N. Y. 356; *Bush v. Westchester Fire Ins. Co.*, 63 N. Y. 531.) It does not follow, however, that this is a reversible error. If the action were solely to enforce the delivery of the policy and to recover thereon as if actually delivered, then service of proofs of loss would be necessary, since in such case the rights of the insured would depend upon his performance of the conditions expressed in the policy as precedent to his right of recovery. (*De Grove v. Metrop. Ins. Co.*, 61 N. Y. 594.) The same would be true if the action were to recover upon an agreement for temporary insurance intermediate the application for it, and the decision of the insurance company, whether it will issue a policy, as in the cases of "binding slips." (*Lipman v. Niagara Fire Ins. Co.*, 121 N. Y. 454; *Karelsen v. Sun Fire Office*, 122 N. Y. 545.) In the two cases last cited the insurance company did not repudiate the binding slip, but claimed to have canceled the contract according to its terms. Recovery was sought in each case under the contract, and not because the agreement to make it was repudiated. In the case of a binding slip the insured has his written contract; in the case of an oral contract he must show his right to one. In the one case the contract speaks for itself, and the action is upon the contract, which for the time being is the policy. In the other case the action may be upon the oral contract, but when the making of the contract is denied and performance by the company, therefore, refused, the action may be for damages for the breach of the contract to deliver the policy as of the date orally agreed upon. The right to the policy is not affected by the fire. (*Ins. Co. v. Colt*, 20 Wall. 560; *Lightbody v. North Am. Ins. Co.*, 23 Wend. 18.)

We may regard this action as one for the recovery of damages consequent upon the breach by the defendant of its contract to issue and deliver the policy, which, if delivered, would have enabled the plaintiff, by complying with its conditions, to secure indemnity for his loss. If the defendant repudiated the contract to issue the policy, it repudiated its conditions, and, therefore, cannot, without showing that it retracted its

repudiation, insist upon the subsequent performance by the insured of any one of them as a condition precedent to his recovery of the damages accruing to him then or thereafter by the completed breach itself. The defendant did not retract the repudiation of the contract, but by its answer repeated and confirmed it. (*Shaw v. Republic Life Ins. Co.*, 69 N. Y. 286; *Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 696; *Meyer v. Knickerbocker Life Ins. Co.*, 73 N. Y. 516; *Robinson v. Frank*, 107 N. Y. 655; *Taylor v. Merchants' Fire Ins. Co.*, 9 How. [U. S.] 390; *Post v. Aetna Ins. Co.*, 43 Barb. 351.)

It would be a useless act for the plaintiff to serve proofs of loss in order to charge the defendant with liability under a contract which it repudiated altogether, and to hold otherwise would be to absolve the offender and punish its victim. As the plaintiff did not commence this action until after seven months after the fire, no question arises whether the action for full damages could accrue upon the breach earlier than under the contract.

If we treat the case as if the policy had been issued, it was not within Hobart's power thereafter to waive proofs of loss, because his power was limited to the making of the contract and delivery of the policy, and did not extend to a subsequent waiver of the conditions which the policy imposed upon Hicks. But as his power was complete over the making of the contract and delivery of the policy, it embraced as its necessary incident power to repudiate the oral contract and thereupon to refuse delivery of the policy, and hence his repudiation and refusal, if made, were the acts of the defendant. In *Ellis v. Albany Ins. Co.* (*supra*) the court not only so held, but also considered the suggestion, renewed in this case, that such a rule would enable the agent to perpetrate a fraud upon the company by making preliminary contracts, when the company only intended to be bound by writing, and answered it by saying that that was no reason for depriving third persons of the benefit of contracts entered into with the agent. We cannot review the finding that the defendant,

through Hobart, did repudiate the contract and refuse to issue the policy.

The charge of the court placed the waiver of the proofs of loss and the lack of necessity to furnish them upon the same finding of facts by the jury. The court was wrong as to the waiver of the proofs, if plaintiff had no right of recovery except under the policy; but upon the same facts the court was right in saying, if the agent claimed that no contract was made, they were not necessary.

As the jury found the facts which made the service of proofs of loss unnecessary, what was said as to waiver was unimportant, and not reversible error.

It is said that the plaintiff sustained no damages by the defendant's breach of its contract to deliver the policy, because she had her remedy upon the oral contract to insure. It could be said with equal force that she had no remedy upon the oral contract to insure because she had her remedy for damages. Obviously she could stand upon all the causes of action which the facts pleaded permitted, and finally avail herself of the one proved. The form of the policy is fixed by statute, but that simply affects ease of proof, and not the remedy upon the proofs.

It was a disputed question of fact upon the trial whether in the interview between Hobart and Hicks, when the oral contract was made, Hobart agreed to place one policy in the defendant company. Hicks affirmed it, and Hobart denied it, and testified that the name of the defendant was not mentioned. The offer of his further testimony to the effect that he had received instructions from the defendant not to insure the plaintiff was excluded by the court upon plaintiff's objection. The evidence was offered in corroboration of Hobart's testimony, the defendant's theory being that having received such instruction, the presumption followed that Hobart obeyed it, and that the defendant was entitled to cast this presumption into the scale. Hobart did not communicate the instruction to Hicks and thus it could not affect him, unless the circumstance in its nature tended to support Hobart, or

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to discredit Hicks. That Hobart received the instruction was immaterial unless he obeyed it. That is not proved by the instruction itself, nor does it tend to prove it.

It may be conceded, as the learned counsel for the appellant insists, with the support of authority, that the presumption is that every man, in his private and official character, does his duty, but this presumption is a shield from attack upon the charge of violation of duty — not a weapon of offense. If his company should sue Hobart for disobedience to its instructions he could rely upon this presumption until the contrary should be proved; but if he should sue his company for some promised reward of obedience the presumption would not avail him; much less can it be used as affirmative evidence against a third person dealing at arm's length against both principal and agent.

In *Fitzgerald v. Dressler* (7 C.B. [N. S.] 374) A., through a broker, sold seed to C., who, through the same broker, sold the seed, at an advanced price, to D. D. was to pay C. before C. was to pay A. D. sent his clerk to the broker for the delivery order, and the broker took the clerk to A., who gave the order to the clerk on his promise that D. would pay A. A. sued D. The court held that there was no presumption that the clerk told D. that he had made the promise. The case, in principle, is like the one before us.

The judgment should be affirmed, with costs.

WERNER, J. (dissenting). It seems to me that we cannot hold that an action may not be brought for the breach of an agreement to insure without distinctly overruling *Ellis v. Albany City Fire Insurance Company* (50 N. Y. 402); *Angell v. Hartford Fire Ins. Co.* (59 N. Y. 171); *Van Loan v. Farmers' M. F. Ins. Assn.* (90 N. Y. 281), and *Post v. Aetna Ins. Co.* (43 Barb. 351). I do not think that the evidence wholly justifies the statement that the action was clearly tried upon the theory of an executed contract of insurance. It is true that the complaint, and the evidence given in support thereof, were undoubtedly appropriate to such an action; but it does not

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follow that they were, therefore, not appropriate to an action for damages arising out of the alleged breach of the contract to insure. It frequently happens that the same pleadings and proofs will support different causes of actions which are governed by inconsistent legal principles. I am prepared to agree with Chief Judge PARKER in holding that under the law providing for the standard policy it is the logical rule to decide that every contract for insurance made with an authorized agent, whether the same be oral or written, constitutes a valid contract of insurance which requires nothing to complete it except the written evidence of its terms and conditions. The cases of *Lipman v. N. F. Ins. Co.* (121 N. Y. 454); *Karelsen v. Sun Fire Office* (122 N. Y. 545), and *Underwood v. Greenwich Ins. Co.* (161 N. Y. 413), cited by him, clearly demonstrate that this is the more recent view of our court. But that is very different from deciding that, when a plaintiff claims that a contract for insurance has been made and broken, and a defendant insurance company denies that any such contract was ever made, a plaintiff can recover only upon the theory of an executed and completed contract. Such a rule would result in exempting insurance companies from the application of one of the most familiar principles of the law of contracts. It is a rule of universal application that when a party to a contract refuses to execute it, the other party thereto may treat it as rescinded and sue for the breach. (Beach on Modern Law of Contracts, sec. 788.) In such a case as this the difference in the character of the action is one of form rather than of substance, because the recovery in either case would be the same. But let us assume that it is now the established law that a party claiming under an oral or a written memorandum for insurance must recover, if at all, upon the terms and conditions of a completed policy which are to be read into his tentative contract. It is conceded that Hobart was the duly authorized agent of the defendant for the purpose of issuing policies of insurance. He was provided with blanks for that purpose, which needed only to be countersigned by him to make them executed and binding contracts.

The right to issue policies included the right to refuse to issue them. Hobart's agreement to issue a policy was the act of the company. Whose act was Hobart's refusal to issue a policy after he had bound the company by his agreement to issue one?

To my mind there is no escape from the conclusion that if he acted for the company in making the agreement, he acted in the same capacity in breaking it. There was a dispute of testimony as to whether he ever made such an agreement with plaintiff's assignor. This presented a question of fact which the jury have settled in favor of the plaintiff. If, then, we treat this as an action upon the policy, and hold the defendant responsible for the acts of Hobart, what is the effect of such acts? The answer seems obvious. If the defendant, through its proper officers, had issued a policy of insurance, and after a loss under the same, had denied its liability on the ground that it never made any such contract, it would be a distinct waiver of the right to demand proofs of loss. (*Shaw v. Republic Life Ins. Co.*, 69 N. Y. 286; *Stokes v. Mackay*, 147 N. Y. 223; *People v. Empire Mut. Life Ins. Co.*, 92 N. Y. 105; May on Insurance, sec. 469; Porter on Insurance [American Notes by Darrach, 1889], star page 194; Richards on Ins. sec. 81; *Grattan v. Met. Life Ins. Co.*, 80 N. Y. 281; *Payn v. Mutual Relief Society*, 6 N. Y. S. R. 365; *Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 696; *Brink v. Hanover Fire Ins. Co.*, 80 N. Y. 113.)

Is the result any different because these things were done by an agent? As we have seen, this agent had authority to issue, and, therefore, to refuse to issue policies. His agreement to issue a policy was the act of his principal. His refusal to issue a policy after he had agreed to do so falls within the same category. Under these circumstances the refusal of the agent has the same effect as though it had actually been made by the principal. Indeed, for the purposes of the particular act, he was the principal. (*Goodwin v. Mass. Mut. Life Ins. Co.*, 73 N. Y. 490-491.)

But it is suggested that the policy provides that no agent

shall have power to waive any of the conditions thereof. This is undoubtedly true after a policy has been issued, and the limited powers of the agent are spent. But in the case before us, the acts of the agent were within the scope of his authority, for until the policy was actually issued he was the *alter ego* of the defendant. At every instant, within the period covered by the negotiations between Hobart and the plaintiff's assignor, the former was acting within the scope of his authority. As the case stands, it is just as though the defendant itself had refused to issue a policy after it had agreed to do so. Under these circumstances the plaintiff and her assignor were not required to present proofs of loss, because they had been absolved from this duty by the acts of the defendant.

If these views are adopted, it follows that the charge of the trial court was substantially correct, wherein it stated that it was not necessary for the plaintiff to serve proofs of loss; and by the same rule it would seem to follow that the instructions relating to the waiver by Hobart were harmless because they were immaterial.

GRAY, O'BRIEN and CULLEN, JJ., concur with PARKER, Ch. J., for reversal. LANDON and WERNER, JJ., read for affirmance and HAIGHT, J., concurs with LANDON, J.

Judgment reversed, etc.

THE WASHINGTON LIFE INSURANCE COMPANY, Respondent,
v. AUGUSTUS CLASON, Appellant, Impleaded with Others.

1. INSURANCE LAW — LOAN BELOW STATUTORY STANDARD MADE BY A DOMESTIC INSURANCE COMPANY NOT A DEFENSE TO MORTGAGOR. An offer of a mortgagor to prove, under his answer in foreclosure, that at the time the mortgagee, a domestic insurance company, made him the loan on his premises they were incumbered and were not worth fifty per centum more than the loan, presents no defense to the action, although the Insurance Law (L. 1892, ch. 690, § 13, amd. L. 1893, ch. 112, amd. L. 1893, ch. 725, § 16), in the interest of policyholders, prescribes that standard for such loans, as the statute does not expressly prohibit such a corporation from investing in anything except insurance stocks; and no implica

tion, that an investment below the standard is prohibited by the statute and is, therefore, void, should be imported to assist the borrower to escape payment.

Washington Life Ins. Co. v. Clason, 16 App. Div. 434, affirmed.

(Argued February 15, 1900; decided March 27, 1900.)

APPEAL from a judgment and order of the Appellate Division of the Supreme Court in the first judicial department, entered May 13, 1897, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

L. Laflin Kellogg and *Alfred C. Petté* for appellant. The bond and mortgage in suit having been taken in direct contravention of the statutes authorizing loans by life insurance companies, are void and no recovery can be had thereon. (L. 1892, ch. 690, §§ 16, 36; *Arnot v. P. & E. C. Co.*, 68 N. Y. 558; *Peck v. Burr*, 10 N. Y. 294; *S. C. Bank v. King*, 44 N. Y. 87; *Melchoir v. McCarty*, 31 Wis. 252; *Pratt v. Short*, 79 N. Y. 437; *Pratt v. Eaton*, 79 N. Y. 449; *N. Y. S. L. & T. Co. v. Helmer*, 77 N. Y. 64; *Vil. of Fort Edward v. Fish*, 156 N. Y. 363; *Leavitt v. Palmer*, 3 N. Y. 19; *Talmage v. Pell*, 7 N. Y. 328; *Tracy v. Talmage*, 14 N. Y. 162.)

George M. Thomson for respondent. The alleged "defenses" are entirely without merit. (L. 1892, ch. 690, §§ 17, 18, 36, 53; *Bowery Bank v. Gerety*, 153 N. Y. 415; *Thompson v. St. Nicholas Bank*, 146 U. S. 240.) The appellant is estopped from asserting the defense of *ultra vires*. (*W. A. Co. v. Barlow*, 63 N. Y. 62; *R. L. R. Co. v. Roach*, 97 N. Y. 378; *D. M. Co. v. Roeber*, 106 N. Y. 473; *Mayor, etc., v. Sonneborn*, 113 N. Y. 423; *Seymour v. S. F. C. Assn.*, 144 N. Y. 333; *B. G. L. Co. v. Claffy*, 151 N. Y. 24; *S. N. Co. v. Weed*, 17 Barb. 378; *Nat. Bank v. Matthews*, 98 U. S. 621; *G. M. Co. v. National Bank*, 96 U. S. 640; *McBroom v. S. I. Co.*, 153 U. S. 326.)

LONDON, J. The complaint is in the usual form for the foreclosure of a past-due mortgage given February 26, 1896, by the defendant Clason to the plaintiff to secure the payment of the defendant's bond of the same date for \$20,000 and interest, which sum the plaintiff then loaned to the defendant.

The plaintiff is a domestic life insurance corporation.

Upon the trial, after the plaintiff had made out a *prima facie* case, the defendant offered to prove under the allegations of the answer that at the time of the making of the loan secured by the bond and mortgage the premises mortgaged were incumbered, and not worth fifty per centum more than the amount loaned thereon.

The trial court held that this constituted no defense, and sustained plaintiff's objection to the offer. The correctness of this ruling is challenged by this appeal.

The Insurance Law (Chapter 690, section 16, Laws of 1892, as amended by chapter 112, Laws of 1893) provides:

"The cash capital of every domestic insurance corporation required to have a capital to the extent of the minimum capital required by law, shall be invested and kept invested in the kinds of securities in which deposits with the superintendent of insurance are required by this chapter to be made. The residue of the capital and the surplus money and funds of every domestic insurance corporation over and above its capital, and the deposit that it may be required to make with the superintendent, may be invested in or loaned on the pledge of any of the securities in which deposits are required to be invested or in the public stocks or bonds of any one of the United States, or except as herein provided, in the stocks, bonds or other evidence of indebtedness of any solvent institution incorporated under the laws of the United States or of any state thereof, or in such real estate as it is authorized by this chapter to hold; but no such funds shall be invested in or loaned on its own stock or the stock of any other insurance corporation."

Section 13 of the same chapter, as amended by chapter 725, Laws of 1893, provides:

“Every deposit made with the superintendent of insurance by any domestic or foreign insurance corporation shall be in the stocks or bonds of the United States or of this state, not estimated above their current market value, or in the bonds of a county or incorporated city in this state, authorized to be issued by the legislature, not estimated above their par value nor their current market value, or in bonds and mortgages on improved, unincumbered real property in this state, worth fifty per centum more than the amount loaned thereon.”

The statute does not declare that loans made upon incumbered real estate, or upon real estate not worth fifty per centum more than the amount loaned thereon shall be void, nor does it expressly forbid them as it does investments in insurance stock, but the defendant's argument is that such loans are by implication prohibited, and are, therefore, void. Why make only one express prohibition if more are intended? This prohibition was added to section 16 by the amendment of 1893.

The manifest-intent of these provisions is to add to the protection of policyholders in insurance companies by requiring the companies to invest the moneys entrusted to their care in securities of unquestionable soundness, certainly not to withdraw such protection and bestow such moneys upon borrowers by invalidating the investment whenever the security should prove to be below the prescribed standard.

The defendant contends that since the corporation has none but conferred powers, and as the power to invest in a security below the prescribed standard is not conferred upon the plaintiff, the power is denied. If the state should make this argument in the proper action, it might be difficult for the plaintiff to answer it, but the defendant is not the sovereign. The state may complain that the mortgage is not up to the standard, without asserting that it is not good for what it purports to be. If we place the defendant in the shoes of the state he would have no better position. Regard being had to the manifest intent of the statute, we can import nothing into it to aid the defendant contrary to that intent, and cannot

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imply a penalty against the plaintiff for the benefit of the defendant, and if necessary we should resort to strict construction to exclude such implication.

The plaintiff has loaned its money to the defendant upon the mortgage, and the defendant seeks to escape from the obligation into which he voluntarily entered to obtain the loan.

The statute permits the plaintiff to invest in mortgages of the prescribed standard. Whether real estate is already incumbered is a fact which a reasonably diligent inquiry may fail to disclose. Whether it is worth fifty per centum more than the amount for which it is to be mortgaged is a matter of opinion; subsequent facts may show that the mortgagee was mistaken in fact or in opinion. Public policy does not require that such a mistake shall be punished by depriving the mortgagee of the security the mortgage is adequate to afford. The penalty due to iniquity is not in such a case visited upon mistake or misfortune. Thus we can understand why the express prohibition was not extended to mortgages but only to insurance stocks. The defendant's offer did not charge iniquity or exclude mistake or misfortune, and, therefore, was properly overruled. (*Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *Rider Life Raft Co. v. Roach*, 97 ib. 378; *Diamond Match Co. v. Roeber*, 106 ib. 473; *Mayor v. Sonneborn*, 113 ib. 423; *Bath Gas Light Co. v. Claffy*, 151 ib. 24.)

In *Bath Gas Light Co. v. Claffy* (*supra*) the contract was void against the state, and was of such a character that VANN, J., in a dissenting opinion, declared it contrary to public policy. If it had been still executory, no doubt the court would have refused to enforce it. But it had been executed and the defendant had enjoyed its benefit. The court, in effect, held that public policy in cases of *ultra vires*, in the absence of positive restriction or inherent vice, does not tempt to dishonesty or reward it, but looks at the situation in all its phases and exacts the justice which the final situation requires, viewed in the light of all the causes leading to it and the consequences to follow from it.

The United States Supreme Court, as the opinion of the learned Appellate Division shows, in cases like this upholds the contract, holding that it is for the government and not for the defendant, who seeks to escape from his obligation, to challenge the act of the creditor. (*National Bank v. Matthews*, 98 U. S. 621; *National Bank v. Whitney*, 103 ib. 99.)

Contracts immoral in their nature or prohibited by statute, or declared illegal or void, or made in the exercise of a power expressly denied, are of course void, and the courts will not aid either party to them. (*Pratt v. Short*, 79 N. Y. 437; *Pratt v. Eaton*, Ib. 449; *N. Y. State Loan and Trust Co. v. Helmer*, 77 ib. 64.)

Certainly not if executory. (*Village of Fort Edward v. Fish*, 156 N. Y. 363.)

Such cases are clearly distinguishable from the one before us.

The defendant also offered to prove that the sum of \$500 was paid to a director of the plaintiff for the procuring of the loan from the plaintiff and as a consideration therefor. No offer was made to show that the plaintiff participated in this alleged offense of the director or that the consideration moved to it.

The offer was properly overruled.

The judgment and order should be affirmed, with costs.

PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, CULLEN and WERNER, JJ., concur.

Judgment and order affirmed.

COMMERCIAL BANK et al., Appellants, v. FREDERICK A. SHERWOOD, Respondent, Impleaded with Others.

1. APPEAL — CODE OF CIVIL PROCEDURE, § 191, SUBD. 2 — QUESTIONS OF LAW REVIEWABLE. An appeal by permission, under subdivision 2 of section 191 of the Code of Civil Procedure, from an unanimous affirmation by the Appellate Division, in an action brought to set aside a sale as in fraud of the rights of creditors, differs from an appeal allowed under section 190 in that it is not restricted to questions certified by the Appellate Division, but all questions of law raised by exceptions and presented

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by the record may be reviewed except the legal question as to the sufficiency of the evidence to sustain a finding of fact or a verdict not directed by the trial court.

2. **CERTIFICATE OF APPELLATE DIVISION.** Questions of law need not be formulated and certified by the Appellate Division in its order granting leave to appeal under subdivision 2 of section 191 of the Code of Civil Procedure, which simply requires that the court certify "that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals."

3. **TENANCY IN COMMON OF PERSONAL PROPERTY.** Personal property, as well as real estate, is subject to the statutory rule (2 R. S. 727, § 44) that "every estate granted or devised to two or more persons in their own right shall be deemed a tenancy in common unless expressly declared to be in joint tenancy."

4. **TRANSFER IN FRAUD OF CREDITORS—VALIDITY AS TO ONE OF TWO TRANSFEREES.** A transfer of property by an insolvent to two of his creditors, in payment of a distinct indebtedness owing to each, gives each of them an undivided one-half interest in the property, and may be sustained as to one of them, although the transfer as to the other is invalid as in fraud of creditors.

5. **EVIDENCE—ADMISSIBILITY OF JUDGMENT AFTER REVERSAL IN PART.** A judgment setting aside a transfer by an insolvent as in fraud of creditors after it has been reversed as to the transferees, but affirmed as to the debtor, is entirely incompetent as against the transferees on a second trial to prove any want of good faith or inadequacy of consideration on their part, or to displace the burden of proof which rested on the plaintiffs in attacking the transfer.

Commercial Bank v. Bolton, 20 App. Div. 70, affirmed.

(Argued February 7, 1900; decided March 27, 1900.)

APPEAL, by permission, from so much of a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 18, 1897, as affirms that part of a judgment dismissing the complaint as to the defendant Frederick A. Sherwood, entered upon a decision of the court on trial at an Equity Term.

The plaintiffs, as judgment creditors of Thomas Bolton, brought this action to set aside a bill of sale of a shoe manufacturing plant, made by Bolton to the defendants Sherwood and Catharine Bolton, in August, 1893, upon the ground that the sale was made to hinder, delay and defraud the creditors of the said Thomas Bolton. The trial was had at an Equity

Term of the court and a decision was filed by the trial judge, containing findings of fact and conclusions of law. It was found that the sale was made prior to the recovery of the plaintiffs' judgments and that it was in pursuance of an agreement between the parties thereto of the same date and referred to the same. The agreement so referred to was between Thomas Bolton, Sherwood and Catharine Bolton and, after reciting and specifying an indebtedness from Bolton to Sherwood and from Bolton to Catharine Bolton, who was his wife, stated that, for the purpose of paying said indebtedness, Bolton agreed to sell and transfer to Sherwood and Catharine Bolton, absolutely, his machinery, etc., stocks, manufactured and unmanufactured, and accounts owing to him and that Sherwood and Catharine Bolton agreed "to purchase the said property and in payment thereof to satisfy the indebtedness above mentioned owing to each of them respectively" by Thomas Bolton. It was, further, found that "said purchase was made by said Sherwood of said undivided half of said factory and business and customers' accounts of said Bolton with full knowledge that by the said sale and transfer to himself and Mrs. Bolton the said Thomas Bolton would have no property remaining with which to pay his indebtedness to others, but said purchase was made by said Sherwood with no other purpose or intent on his part than to obtain payment of said Bolton's indebtedness to himself in preference to other creditors." It was found that, while the value of the undivided one-half interest sold to Sherwood, if taken and used in the business, with the right to use Bolton's name in connection therewith, was greater than the consideration paid by Sherwood therefor, its worth, "if closed out in the ordinary way of settlement of insolvents' estates" was less than the amount allowed therefor by Sherwood. It was, further, found that "Thomas Bolton made the said transfer to Sherwood for the purpose of paying his indebtedness to him and without any intent or expectation of ever receiving to his own use any part of the undivided half of said property sold and transferred by him to Sherwood and without receiving to him-

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self any benefit therefrom, except that which would incidentally follow if he could have the business continued and the half which he transferred to his wife employed therein." It was found that the sale to Catharine Bolton, his wife, "of the undivided one-half part of his property and assets was, in any view that may be taken of their dealings with each other, made upon an inadequate consideration, and with the purpose and intent on their part of enabling him to retain and control the said property so transferred to her, and keep the same employed in said business for his own use and benefit in fraud of his creditors and particularly the plaintiffs herein." The conclusions of law were "that the complaint should be dismissed as against the defendant Frederick A. Sherwood" and, further, "that the said bill of sale * * * and the agreement * * * are, and each of said instruments is, fraudulent and void, so far as the same purport to sell and convey to the defendant Catharine Bolton the undivided one-half of the property therein mentioned and described, as against the plaintiffs in this action and that the said undivided one-half of said property so transferred to the defendant Catharine Bolton was, and is, applicable to the payment of the plaintiffs' said judgments."

The judgment, which was entered upon the decision of the trial judge, has been unanimously affirmed by the Appellate Division, of the fourth department. An application, made by the plaintiffs for leave to appeal to the Court of Appeals from the judgment of affirmance, was granted and the Appellate Division, in its order granting the application, certified two questions of law to this court, to wit: "(1) Was the defendant Sherwood a *bona fide* purchaser for value, not having delivered all the notes of Bolton, which he agreed to deliver, prior to his receiving notice that the sale to him and Mrs. Bolton was claimed to be in fraud of creditors? (2) The trial court having found that the said bill of sale of August 2d, 1893, was fraudulent and void, in so far as it transferred property to Mrs. Bolton, does it follow as matter of law from the findings and from the undisputed facts in the case that

said bill of sale was fraudulent as to both vendees named therein? ”

The appeal of the plaintiffs relates only to so much of the judgment as affirmed that part of the judgment of the trial court, which dismissed the complaint upon the merits as to the defendant Sherwood.

Walter S. Hubbell for appellants. The undisputed evidence shows that the bill of sale of August 2, 1893, was fraudulent and void as to the defendant Sherwood as well as to the defendants Thomas Bolton and Catharine Bolton. (*Boon v. Moss*, 70 N. Y. 465.) The plaintiffs are not limited upon this appeal to the two questions certified to this court by the Appellate Division. (*Young v. Fox*, 155 N. Y. 615; *Reed v. McCord*, 160 N. Y. 330.) It was error for the trial court to exclude the judgment roll as evidence in this action. (*Starin v. Kelly*, 88 N. Y. 418; *Loos v. Wilkinson*, 110 N. Y. 195; *R. H. M. Co. v. Stewart*, 57 Hun, 545; *Waterbury v. Sturtevant*, 18 Wend. 353; *Galle v. Tode*, 148 N. Y. 270; *Macaulay v. Smith*, 132 N. Y. 524; *McDonald v. Belding*, 145 U. S. 492; *Zoeller v. Riley*, 100 N. Y. 108; *Murphy v. Briggs*, 89 N. Y. 446; *Parker v. Conner*, 93 N. Y. 118.) The defendant Sherwood failed to show that he was a *bona fide* purchaser without notice of Thomas Bolton's fraud. (*Sargent v. E. S. A. Co.*, 46 Hun, 19; *Thomas v. Stone*, Watkins' Ch. 117; *McBee v. Loftis*, 1 Strob. Eq. 90; *Hardingham v. Nicholls*, 3 Atk. 304; *Doswell v. Buchanan*, 3 Leigh, 365; *Macaulay v. Smith*, 132 N. Y. 525.) The trial court erred in deciding, as matter of law, that the defendant Sherwood, by the bill of sale, bought an undivided half of the assets of Thomas Bolton. (*Boon v. Moss*, 70 N. Y. 465; *Mitchell v. Read*, 84 N. Y. 556.) The contract of sale is entire, and being void as to Mrs. Bolton is void also as to Sherwood. The rule of law is that when part of an entire contract is void the whole is void. (*Crawford v. Morrell*, 8 Johns. 253; *Van Alstine v. Wimple*, 5 Cow. 162; *Niver v. Best*, 10 Barb. 369; *Bump on Fraud. Conv.* 472; *Prince v.*

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Shepard, 9 Pick. 176; *Bank v. Thompson*, 121 N. Y. 280; *Williams v. Whedon*, 109 N. Y. 333; *Huguenin v. Baseley*, 14 Ves. 273; *Russell v. Winne*, 37 N. Y. 595; *Meguire v. Corwine*, 101 U. S. 108; *Holt v. Creamer*, 34 N. J. Eq. 187.)

William F. Cogswell and *M. H. McMath* for respondent. The appellants' contention that the *bona fides* of Sherwood's purchase is affected by the fact that he did not take up and cancel all of Bolton's notes which were in the bank at the time of the transfer is without merit. (*Murphy v. Briggs*, 89 N. Y. 446; *Seymour v. Wilson*, 19 N. Y. 417; *Ledyard v. Butler*, 9 Paige, 132; *Smith v. Post*, 3 T. & C. 647.) The trial court did not decide, as matter of law, as stated by appellants, that the defendant Sherwood, by the bill of sale, bought an undivided half of the assets of Thomas Bolton. The question was not and is not a question of law, but was and is a question of fact depending upon the facts and circumstances connected with the execution of the transfer as well as upon the transfer itself. (*Prince v. Shepard*, 9 Pick. 176; *Smith v. Post*, 3 T. & C. 647; *Snyder v. Sponable*, 1 Hill, 570; *Craig v. Hoge*, 95 Va. 275; *Linz v. Atkinson*, 14 Tex. App. 653; *Atkinson v. Hooks*, 9 Ala. 704.) A deed or agreement may be void in some respects and not in others, and where the one is separable from the other the good will be saved. (*Curtis v. Leavitt*, 15 N. Y. 96; *Knower v. C. N. Bank*, 124 N. Y. 552.)

GRAY, J. It should first be understood what effect is to be given to the order of the Appellate Division, which allowed this appeal and then certified the two questions mentioned to this court. By subdivision two of section 191, of the Code of Civil Procedure, it was provided that no appeal should be taken to this court from a judgment of affirmance rendered in such an action as this, brought "to set aside a judgment, sale, transfer, conveyance, assignment or written instrument, as in fraud of the rights of creditors, * * * when the decision of the Appellate Division of the Supreme Court is unanimous, unless such Appellate Division shall certify that

in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals, or unless in case of its refusal to so certify, an appeal is allowed by a judge of the Court of Appeals." This restriction of our jurisdiction, by the legislative amendment of the Code section, was within the authority reserved by the constitutional amendment of 1894 to the state legislature, and was in furtherance of the general plan to relieve this court by limiting its labors to the review of questions of law; which, alone, should come before the court of last resort, as it is constituted in this state. But, in so restricting appeals, which, prior to the amendment of section 191, could be taken, as of right, to this court, the legislature excepted cases, where leave was given by the Appellate Division, or the appeal was allowed by this court. It will be noticed, in that respect, that the right to appeal, when conferred in either way, is quite other than the right which is given under section 190. There, when an appeal is allowed by the Appellate Division, questions are to be certified and they, only, are brought up; while under section 191, when the appeal is permitted to be taken, the effect is to remove the restriction of the section and, thus, to open the whole case for our review, so far as questions of law appear to be presented by the record. The provision of the one section goes to our jurisdiction to review; the other, while excepting classes of actions from the right of appeal, leaves the case, whose appeal is permitted, to our unrestricted review as to any questions of law involved. That those questions of law, however, do not include the legal question as to the sufficiency of the evidence to sustain a finding of fact, or a verdict not directed by the court, cannot be doubted, in view of the provisions of the 3d and 4th subdivisions of section 191; which impose conditions bearing upon all cases brought to this court under either section. By them our jurisdiction is "limited to a review of questions of law," (subd. 3) and we may not review a "unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court"

(subd. 4). Where the order of the Appellate Division shows its affirmance to have been unanimous, of necessity, it follows that the members of the court sitting upon the appeal, so far as the determination below depended upon evidence, were agreed upon its existence and sufficiency.

This subject has been, in different phases, under our consideration recently, and we have held that the allowance of the appeal by the Appellate Division brings before us for determination every question of law that arose upon the trial, which we are not forbidden by the Constitution to review, and such a forbidden question is that which relates to the existence and the sufficiency of the evidence upon the trial. The permission to appeal, under subdivision 2 of section 191, in no way enlarges the jurisdiction of this court with respect to the questions that may be reviewed by it upon a hearing of the appeal. (*Reed v. McCord*, 160 N. Y. 330; *Young v. Fox*, 155 ib. 615; *Grannan v. Westchester Racing Ass'n*, 153 ib. 449.)

Nor need questions of law be formulated and certified by the Appellate Division in its order granting leave to appeal. The provision of the statute simply requires that it certify "that, in its opinion, a question of law is involved which ought to be reviewed by the court of appeals." It is only under subdivision 2 of section 190 that questions must be certified to this court; a provision contemplating the existence of questions of law in determinations, not final in their nature, which may affect the ultimate judgment, as they are decided one way or the other, and as to which the Appellate Division is entitled to the opinion of this court, in the general interest that litigation shall not be needlessly protracted.

The questions now certified here were unnecessarily inserted in the order and the first one is not suggested by any finding of fact, nor does it present any question of law which we may review. The second question is involved in the exception to the dismissal of the complaint as to Sherwood and will be considered under that exception. By force of the order allowing the appeal to this court, the appellants are permitted

to present such legal errors upon the trial and in the decision of this case as are raised by exceptions to rulings upon the admissibility of evidence, or to conclusions of law based upon the findings. They have insisted, very strenuously, upon the effect of the evidence; as showing that the transaction of sale with Sherwood was fraudulent and void and that he had failed to show that he was a *bona fide* purchaser. But those were questions depending upon the evidence and have been conclusively settled for this court. It has been established as a fact that the purchase by Sherwood of an interest in Bolton's plant and manufacturing stock was for the consideration of the discharge of Bolton's indebtedness to him and was absolute. We may not now review the facts of the transaction, nor its *bona fides*.

The exception taken by the plaintiffs to the conclusion of law, "that the complaint herein should be dismissed as against the defendant Frederick A. Sherwood, with costs," raises the principal question for our consideration. It is the claim of the appellants that the contract of sale was such that, being declared void as to Mrs. Bolton, it was void, also, as to Sherwood. I think the proposition to be untenable.

Bolton was at liberty to pay such of his creditors as he chose, even to the extent of transferring all of his property to the favored ones. The plaintiffs and Sherwood were general creditors, and, as between them, there were no superior equities. Each was entitled to get his debt preferred in payment, if he could, and, provided no deceit, or fraud, was practiced in doing so, the transaction would be valid. There is no fraud found on Sherwood's part and the transfer was made in payment of an indebtedness, validly owing to him and representing a fair consideration for a one-half interest in the debtor's property. The transaction, therefore, rested upon what the law regards as a valuable consideration. The rule of law was satisfied, if the creditor acted in good faith, in the sense that his purpose was to obtain satisfaction of his debt. That the debtor's intent may have been to prefer him and that he may have had notice of his object, are facts which have no

effect upon the title acquired. (*Seymour v. Wilson*, 19 N. Y. 417; *Dudley v. Danforth*, 61 ib. 626; *Murphy v. Briggs*, 89 ib. 447; *Warren v. Wilder*, 114 ib. 209; *Knower v. C. N. Bank*, 124 ib. 552.)

The appellants say that the interests of Sherwood and of Mrs. Bolton, under the bill of sale, were joint and not separate. The decision of the trial court would seem to be decidedly adverse to that contention; for, although there is no finding in precise terms that Sherwood agreed to, and did, purchase an undivided one-half interest in Bolton's property, every finding described the subject of the purchase as having been such. The agreement, which was simultaneously executed and which was referred to in the bill of sale, shows that Bolton's two creditors were arranging to obtain the payment of his separate debts to them through the purchase of his property; the consideration being the discharge of an indebtedness, which was distinct and separate as to each of the transferees and in no sense joint. Any doubt upon the subject, however, would seem to be removed by the nature of the bill of sale, which was to Frederick A. Sherwood and to Catharine Bolton, in their own right. By such a transfer they must be deemed to take as tenants in common and not by a joint interest. The statutory rule that "every estate granted, or devised, to two or more persons, in their own right, shall be deemed a tenancy in common, unless expressly declared to be in joint tenancy," (2 R. S. 727, § 44) I think should apply as well to a transfer of personal property as to real estate. It indicates a policy of the state with respect to ownership of property and should be given general application as a rule. That this provision of the Revised Statutes has been so viewed, in its relation to personal property, is shown in several cases. Judge DENIO, in *Everitt v. Everitt*, (29 N. Y. at p. 72), held that it applied to bequests of personalty to legatees and that they would take distributively, and not jointly, thereunder. Justices BARRETT and BRADLEY speaking for the General Terms of the Supreme Court, in the first and fifth departments, respectively, held the same doctrine. (*Lane v. Brown*,

20 Hun at p. 387; *Matter of Lapham*, 37 ib. 15.) In the latter case, Justice BRADLEY observed that, in this country, the policy is in favor of severalty in the ownership of property, both real and personal, and that "such effect will ordinarily be given to rights and interests in respect to it; unless a purpose to vest or hold it jointly is fairly indicated, or required by construction." The transfer, in the present case, was to two of Bolton's creditors, in payment of a distinct indebtedness owing to each, and they took, not jointly, but in common; both under the statute and by a proper construction of the agreement. Each acquired an undivided one-half interest in the subject of the sale by a distinct title, whose validity could not be affected by title failing in the other, through participation in some fraud of the debtor, for inadequacy of consideration, or for other reasons. The effect of the judgment annulling the transfer to Mrs. Bolton was, simply, to leave the bill of sale standing alone as containing the transfer to Sherwood.

The only other question of law, which we are called upon to consider, is raised by an exception of the plaintiffs to the exclusion by the trial judge, upon the opening of the trial, of the offer in evidence of "the judgment roll in the action at issue upon the first trial before RUMSEY, J." Upon objection being made to its competency, the plaintiffs' counsel stated that the "purpose of the offer is to prove the judgment of the Supreme Court in favor of the plaintiffs and against the defendant Thomas Bolton, adjudging the transfer made by him on August 2d, 1893, to the defendants Sherwood and Catharine Bolton, was made to hinder, delay and defraud these plaintiffs." The record does not further describe the judgment roll thus offered; but it appears from the appellants' brief that, upon a previous trial of the issues in this case, a judgment then recovered by these plaintiffs against Thomas Bolton, Catharine Bolton and Sherwood, on being appealed to the General Term of the Supreme Court, was affirmed as to Thomas Bolton, but was reversed as to Mrs. Bolton and Sherwood and that a new trial was ordered as to them. It is

now claimed by the appellants that they were entitled to prove the judgment, which they recovered upon the former trial, as conclusive evidence of Thomas Bolton's fraud. Assuming that their offer of proof was sufficient to raise the question, it is very clear that the evidence was incompetent. The offer was of a judgment adjudging the transfer by Thomas Bolton to Sherwood and Catharine Bolton to have been made to defraud these plaintiffs. But, so far as Sherwood and Catharine Bolton were concerned, the judgment had been reversed and the effect of the reversal was to restore them and the plaintiffs to the same situation in which they were prior to the rendition of the judgment. There was no longer any judgment affecting Sherwood, or Mrs. Bolton, and when another trial came on, it was, as to them, as if the cause had never been decided by any court. Whatever its conclusiveness as to Thomas Bolton, it had no more effect as proof upon Sherwood, or Mrs. Bolton, than the introduction of so much blank paper. What *was* the judgment of the court, at one time, had ceased to be its judgment, by the decision of the Appellate Division, with respect to the transfer to them. It was wholly immaterial that it stood as to Bolton; for his fraud could not vitiate the sale, unless participated in by the vendees. The burden was upon the plaintiffs to show a want of good faith, or some inadequacy of consideration, on the part of Sherwood and of Mrs. Bolton and the offer of the judgment roll, whatever it was, proved nothing upon the subject, nor displaced the burden of proof.

I think the judgment should be affirmed, with costs.

PARKER, Ch. J., O'BRIEN, HAIGHT, LANDON, CULLEN and
WERNER, JJ., concur.

Judgment affirmed.

DAVID STEINER, Respondent, v. FOURTH PRESBYTERIAN
CHURCH, THIRTY-FOURTH STREET, Appellant.

REAL PROPERTY—DEFECT IN TITLE—WAIVER OF, BY VENDEE. A waiver of a defect in the title of land by a vendee who had made a contract for its purchase several months before, but by decision of a court on agreed facts has been relieved from his obligation to take the land, must be deemed to relate back to the time when the contract was required to be completed and stand as of that date, so as to make him liable for the expense of preserving the property in the meantime, though he had not been in possession of it.

Steiner v. Fourth Presbyterian Church, 17 App. Div. 500, reversed.

(Argued February 16, 1900; decided March 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 21, 1897, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Henry Thompson for appellant. The plaintiff upon his own showing made out no cause of action for money had and received to plaintiff's use. (*Carpenter v. Stillwell*, 3 Abb. Pr. 459; *Dumois v. Hill*, 2 App. Div. 525, affg. *Dumois v. Hill*, 11 Misc. Rep. 242; *Dieckerhoff v. Alder*, 12 Misc. Rep. 445; *Fox v. McComb*, 68 Hun, 633.) Plaintiff could not, even in equity, in an action for specific performance, compel defendant to bear the added expenses of carrying the title for seven months; but, on the contrary, the delay having been occasioned by his refusal to take title, March 1, 1894, when he finally concluded to waive his objection and accept the deed, which defendant at all times was ready and willing to deliver, he should himself bear the interim expenses. (*Day v. Hunt*, 112 N. Y. 191; *Haffey v. Lynch*, 19 N. Y. Supp. 59; *Story's Eq. Juris.* § 742; 3 *Pom. Eq. Juris.* 446; *Merchants' Bank v. Thomson*, 55 N. Y. 12; *Hubbell v. Von Schoening*, 49 N. Y. 331; *Voorhees v. De Meyer*, 2 Barb. 37; *Dias v.*

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Points of counsel.

Glover, 1 Hoff. Ch. 71; *Worrall v. Munn*, 53 N. Y. 185.) Where specific performance of a contract for the sale of land is decreed, the court will, so far as possible, place the parties in the same position they would have been in if the contract had been performed at the time agreed upon. (*Bostwick v. Beach*, 103 N. Y. 414; Fry on Spec. Perf. 481, 483, 889; *Dias v. Glover*, 1 Hoff. Ch. 71; Story's Eq. Juris. § 789; *Worrall v. Munn*, 38 N. Y. 137.) There was no express contract to pay back the money received on the delivery of the deed. Plaintiff was in duty bound, if he desired to take the property after the expiration of seven months from the contracted time, the delay having been occasioned by his objection, and the litigation instigated by him, to pay the interest on the mortgage and the other expenses. (*Burke v. Witherbee*, 98 N. Y. 562-565; *Tate v. McCormick*, 23 Hun, 218; *Martine v. Huyler*, 8 N. Y. Supp. 734.)

Emanuel J. Myers for respondent. Upon agreement to convey on payment of a consideration named, the acts of the vendor and vendee are reciprocal and concurrent, and without full performance by the vendor, the vendee cannot be placed in default, without which no interest will accrue on the unpaid purchase price. (*Dyker M. L. & I. Co. v. Cook*, 159 N. Y. 6; *Darrow v. Cornell*, 30 App. Div. 115; *Vought v. Williams*, 120 N. Y. 253; *Irving v. Campbell*, 121 N. Y. 353; *Moore v. Williams*, 115 N. Y. 586; *Carman v. Pultz*, 21 N. Y. 547; *Leaird v. Smith*, 44 N. Y. 618; *Hoag v. Parr*, 13 Hun, 95; 2 Dart's Law of Vend. & Pur. [5th ed.] 627, 628; *Mitchell v. Bartlett*, 52 Barb. 319; *Bostwick v. Beach*, 103 N. Y. 414.) Until judgment was entered in due form the vendor's agreement remained in full force, unimpaired by the finding or opinion of the court upon the submission as to the marketability of the title. (*McKeon v. See*, 51 N. Y. 300; *Niendorff v. M. Ry. Co.*, 150 N. Y. 276; *Springer v. Bien*, 128 N. Y. 99; *Lance v. Shaughnessy*, 86 Hun, 411; *Robinson v. N. Y., L. E. & W. Ry. Co.*, 64 Hun, 41; *Houston v. Williams*, 13 Cal. 24; *Croswell v. Byrnes*,

9 Johns. 287; *Child v. Morgan*, 52 N. W. Rep. 1127; *Whitwell v. Emory*, 3 Mich. 84; *Newbould v. Stuart*, 15 Mich. 155.) The learned trial justice did not err in refusing to charge the defendant's requests to instruct the jury. (*Hopkins v. Clark*, 158 N. Y. 299; *McKeon v. See*, 51 N. Y. 300; *Manafield v. N. Y. C. & H. R. R. Co.*, 114 N. Y. 331; *Schwinger v. Raymond*, 105 N. Y. 648; *W. C. R. R. Co. v. Feldstein*, 169 Ill. 139; *Pierce v. Walters*, 164 Ill. 565.)

HAIGHT, J. The appellant, a religious corporation, instituted proceedings in the Supreme Court for leave to sell its real estate on Thirty-fourth street in the city of New York, and in such proceedings, with the approval of the court, it entered into a contract with the plaintiff to sell and convey to him such real estate in consideration of the sum of one hundred and ninety thousand dollars (\$190,000), the deed to be delivered and the purchase price paid on the first day of March, 1894. When the time for completing the purchase arrived it was found that restrictive covenants were connected with the defendant's title, and thereupon the parties in writing agreed to a postponement of the transfer until the 20th day of March, 1894, the "settlement to be then made as of March first, 1894." During the interval the parties further agreed to submit to the General Term of the Supreme Court, upon an agreed statement of facts pursuant to sections 1279 and 1281 of the Code of Civil Procedure, the question as to whether the restrictive covenants under which the defendants held title was an incumbrance upon the premises. In the meantime settlement remained in abeyance without further adjournment. In June following the General Term rendered its decision to the effect that the plaintiff could not be compelled to perform the contract and that he was entitled to recover the money that he had paid thereon, with interest and costs. (79 Hun, 314.) No judgment, however, was ever entered upon this decision. On the 12th day of October, 1894, the parties again met pursuant to appointment to close

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the contract, the plaintiff then announcing that he was willing to accept the title notwithstanding the decision of the General Term; but a dispute arose as to whether the transaction should be closed as of March 1st or October 12th, and as to whether the plaintiff should be charged with the watchman's services, insurance, interest, etc., accruing between those dates. Those representing the church contended that they had no authority to enter into a new contract for the sale of the property, and that if the plaintiff wished the property he must take it under the contract approved by the court as of the date fixed by that contract; if he did not, they stood ready to return to him the money paid upon the contract, with interest. The plaintiff claimed that the title was defective; that he was not required to take title under the contract on the day fixed therein; that he had not had possession of the property and was not responsible for the delay, and that, consequently, the expenses referred to should be borne by the church. He, however, finally concluded to pay the charges demanded and took the title as of the 1st day of March, with the understanding, as he claimed, that the payment should not be deemed voluntary and that the question of his liability to pay such charges should be determined by the court. This action was accordingly brought, and no question is made with reference to the amount of, or the necessity for, such charges.

At the conclusion of the trial, the defendant's counsel requested the court to charge that "upon the undisputed facts of the case it appears that the defendant offered, on the 12th of October, to carry out the original contract as of the date of March 1st, 1894; that the plaintiff had the right either to accept or reject the offer; that by taking the deed and bearing the expenses of carrying the title from March 1st to October 12th, 1894, plaintiff must be held to have accepted the proposition of the defendant, and neither party is now at liberty to withdraw from the agreement thus concluded." Also, "that if the contract was carried out on the 12th day of October, 1894, as of the 1st of March, 1894, the plaintiff would be required, under the terms of the contract, to

bear the expenses of carrying the property from March 1st to October 12th, 1894." Also, "that the plaintiff has made out no cause of action against the defendant." And finally, "that upon all the facts of the case the plaintiff's complaint should be dismissed." These requests were severally refused by the court, and an exception was taken to each by the defendant.

We think the rulings excepted to were erroneous, and that the judgment must be reversed. The evidence is without substantial dispute, except as to the claim of the plaintiff that it was understood that the payment of the interest, insurance and watchman should not be deemed voluntary, and as to that we shall assume the facts to be as testified by the plaintiff. It is clear that no new contract was entered into between the parties. The only contract between them for the sale of the premises approved by the court required the money to be paid and the deed delivered on the 1st day of March, 1894. It may be, as claimed by the plaintiff, that he was not obliged to take the title tendered by the defendant. It appears that the General Term so held, but no judgment upon that decision has been entered, and we, consequently, have no adjudication that there was a defect in the title; but assuming that there was, the plaintiff elected to waive the defect and to take the title, and this he of necessity did under the contract. By the terms of that contract he was required to pay for the premises and take the title on the first day of March. Under the adjournment to the 20th of March he agreed that the settlement should be made as of March 1st. The submission of the question of the title to the General Term upon the facts agreed upon, did not change the force or the effect of the agreement to sell and convey to him; it furnished him with an authority for annulling the contract, but he did not conclude to avail himself of it and by demanding the title under the contract he waived the defects, and in so doing he became bound by the contract with the same force and effect as if no defects existed. The learned Appellate Division, in the prevailing opinion, appears to have considered that the

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Statement of case.

defendant was in default in not tendering the plaintiff a perfect title on the day named in the contract and that the plaintiff was free from fault. The difficulty with this conclusion is that if there was a defect in the title, the plaintiff waived it. It is true he did not waive it at the time fixed for passing the title, but he did waive it on the 12th of October following, without any new agreement in any respect modifying or changing the contract. His waiver, therefore, must be deemed to relate back to the time when the contract was required to be completed and stand as of that date. He could not postpone his election to take or reject the title, thereby retaining the use of his money and compelling the defendant to be at the expense of preserving the property without reimbursement. If he could do so for eight months he could do so for a year or some longer period. Such a rule would be most unjust and we think has no existence.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

GRAY, O'BRIEN, LANDON, CULLEN and WERNER, JJ., concur; PARKER, Ch. J., not sitting.

Judgment reversed, etc.

CHARLES W. SLOAN, Respondent and Appellant, v. ANNA W. BAIRD, Appellant and Respondent.

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INTEREST — MARKET VALUE. In an action to recover unliquidated damages for the breach of an executory contract to convey property, interest is not allowable unless there is an established market value of the property or means accessible to the party sought to be charged of ascertaining by computation or otherwise the amount to which the plaintiff is entitled.

Sloan v. Baird, 12 App. Div. 481, affirmed.

(Argued February 18, 1900; decided March 27, 1900.)

CROSS-APPEALS from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 11, 1897, modifying, and affirming as modified, a

judgment in favor of plaintiff entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

Julien T. Davies for plaintiff, respondent and appellant. The learned Appellate Division erred in disallowing that portion of the amount recovered by the plaintiff, which was awarded as interest. (*Cooley v. Lobdell*, 153 N. Y. 596; 22 Am. & Eng. Ency. of Law, 94; *Phillips v. Berger*, 8 Barb. 527; *Newton v. Bronson*, 13 N. Y. 587; *Sutphen v. Fowler*, 9 Paige, 280; *Myers v. De Mier*, 4 Daly, 343; 52 N. Y. 647; *Worrall v. Munn*, 38 N. Y. 137; *Bostwick v. Beach*, 103 N. Y. 414; 105 N. Y. 661; *Hathaway v. Payne*, 34 N. Y. 103; *Moore v. Burrows*, 34 Barb. 173; *Cogswell v. Cogswell*, 2 Edw. Ch. 238.)

Albert H. Atterbury for defendant, appellant and respondent. The referee erred in allowing interest on the amount of damages, and the Appellate Division was correct in striking this out. (*Smith v. Veilie*, 60 N. Y. 106; *White v. Miller*, 71 N. Y. 118; 78 N. Y. 393; *McMaster v. State*, 108 N. Y. 542; *Manafield v. N. Y. C. & H. R. R. Co.*, 114 N. Y. 331; *de Carricarti v. Blanco*, 121 N. Y. 230; *Blake v. Krom*, 128 N. Y. 64; *Gray v. C. R. R. Co.*, 157 N. Y. 483.)

HAIGHT, J. The defendant was the owner of certain lands, buildings and machinery at Trenton, New Jersey, known as the plant of the Hamilton Rubber Company. She entered into a certain contract with the plaintiff by which she agreed to sell and convey the property to him within a time specified for the sum of fifty thousand dollars (\$50,000). At the time specified the plaintiff tendered performance, but the defendant refused to convey the property to him; but instead, conveyed it to one Skrim. This action was brought to recover the damages which the plaintiff sustained by reason of the defendant's refusal to perform her contract.

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The case was tried before a referee, who awarded the plaintiff fifteen thousand five hundred dollars (\$15,500) damages, with interest thereon from the date of the breach of the agreement. The Appellate Division modified the judgment by deducting from the damages awarded by the referee the sum of two thousand eight hundred fifty-three dollars and fifty-four cents (\$2,853.54) as interest, and also by deducting the sum of one hundred forty-two dollars and sixty-eight cents (\$142.68) from the amount awarded as extra allowance in addition to costs, and as so modified the judgment was unanimously affirmed.

We have examined the exceptions raised by the defendant's appeal and are of the opinion that the questions involved were properly disposed of by the Appellate Division. The only question which we shall here discuss arises upon the plaintiff's appeal, in which he claims that the Appellate Division improperly modified the judgment by deducting from the sum awarded the interest from the time of the breach of the contract.

It is true that much has been written upon the subject of awarding interest, and that the authorities are not in entire harmony. But we must regard the question here under consideration as settled by our recent decision in the case of *Gray v. Central R. R. Co. of N. J.* (157 N. Y. 483). In that case the rule adopted by EARL, J., in *White v. Miller* (78 N. Y. 393) and by BRADLEY, J., in *Manafield v. N. Y. C. & H. R. R. Co.* (114 N. Y. 331) was approved and followed. The rule as stated in these cases is to the effect that in an action to recover unliquidated damages for a breach of a contract, interest is not allowable unless there is an established market value of the property, or means accessible to the party sought to be charged of ascertaining by computation, or otherwise, the amount to which the plaintiff is entitled. (See, also, *McMaster v. State*, 108 N. Y. 542.) The damages in this case were the difference between the amount which the plaintiff agreed to pay and the value of the property. The property consisted of a parcel of land

upon which there were buildings inclosing a quantity of machinery used in the manufacture of rubber. The factory had been operated for a number of years, but at the time of the contract it stood idle and unused. The property was of a special kind fitted for a peculiar business, and its value depended largely upon its location, condition and the demand for the goods which it was designed to manufacture. It appears that the machinery constituted the chief value of the property, and its long use, of necessity, produced a deterioration and impaired its value. The expert witnesses called upon the question of the value of the property widely differed in their judgments. With reference to the machinery their estimates ranged from five thousand dollars to forty-eight thousand dollars, and upon the whole property from thirty-five thousand dollars to one hundred thousand dollars. It is thus apparent that the damages sought to be recovered were not only unliquidated, but that no means were accessible to the defendant of ascertaining the amount which might be awarded by a jury and she called upon to pay. But it is said there was a market value. If so, what was it? Was it thirty-five thousand dollars or one hundred thousand dollars? The market value of property is established when other property of the same kind has been the subject of purchase or sale to so great an extent and in so many instances that the value becomes fixed. Bouvier, in his Law Dictionary, defines market value as a price established by public sales, or sales in the way of ordinary business, as of merchandise. The Century Dictionary defines market price as being the current price. (See, also, *Murry v. Stanton*, 99 Mass. 345, 348.) While evidence was given by experts showing the value of the property, there is no evidence showing that this property had a market value established and fixed by which the defendant could determine the damages which the plaintiff was entitled to recover or compute the interest thereon, and there is no finding by the referee that the property had a market value.

The judgment should be affirmed, without costs to either party.

O'BRIEN, J. The judgment in this case was entered upon the report of a referee and awarded to the plaintiff damages for a breach by the defendant of an executory contract in writing whereby the defendant agreed to sell and convey to the plaintiff certain real estate at a specified price. The complaint alleges the due execution and delivery of the contract, the breach thereof by the defendant in refusing to convey upon tender of the purchase price, the sale by her to another party before the action was commenced, and the damages. The only fact alleged upon which the defendant in her answer took issue was the amount of the damages, and that was the only question which the referee was required to determine. He found that the property which the defendant had agreed to sell to the plaintiff for \$35,000, subject to a mortgage of \$15,000, was worth at the date of the breach of the contract at least \$65,500, and that the damages amounted to \$15,500, with interest thereon from the date of the tender by the plaintiff of the purchase price. The Appellate Division, in affirming the judgment as to the damages, held that the item of interest, amounting to \$2,853.54, was improperly allowed, and modified the judgment by striking it out of the recovery. Both parties have appealed to this court, the defendant from the whole judgment, and the plaintiff from that part of it which decides that interest was not allowable.

The defendant's appeal, therefore, rests upon the exceptions taken at the trial and the plaintiff's appeal upon the question of interest upon the damages from the date of the breach. The defendant having deprived the court of the power to decree specific performance of the contract, was bound to respond to the plaintiff in such damages as were found to have been sustained by him in consequence of the breach resulting from the tender of performance and the refusal of the defendant to convey. (*Cooley v. Lobdell*, 153 N. Y. 596.) The circumstance that the real property constituting the subject-matter of the contract was situated in another state presented no obstacle to the jurisdiction. (*Newton v. Bronson*, 13 N. Y. 587; *Gardner v. Ogden*, 22 N. Y. 327; *Sutphen v. Fow-*

ler, 9 Paige, 280; *Ward v. Arredondo*, 1 Hopk. Ch. 213.) Tender of the purchase price is generally regarded as equivalent to payment, and until conveyance made the vendor holds the title as trustee for the vendee. (*Pelton v. W. F. Ins. Co.*, 77 N. Y. 605; *Hathaway v. Payne*, 34 id. 92; *Cogswell v. Cogswell*, 2 Edw. Ch. 231.) Upon tender of performance by the plaintiff and refusal of the defendant to convey, the damages for the breach of the contract is the difference between the contract price and the market value of the property at the time of the breach, and the vendee becomes then entitled to the rents and profits. (*Worrall v. Munn*, 38 N. Y. 137; *Bostwick v. Beach*, 103 id. 414; *S. C.*, 105 id. 661; *Margraf v. Muir*, 57 id. 155; *Pumpelly v. Phelps*, 40 id. 66.)

The decision of the referee upon the facts is conclusive upon this court, and but two exceptions are relied upon by the learned counsel for the defendant to sustain her appeal. They were taken to a ruling of the referee permitting two witnesses to express an opinion as to the value of the property, first, from their knowledge and observation of the property, and, again, upon a hypothetical question in the form usually propounded to experts on other subjects. The real estate which was the subject of the controversy was a rubber factory at Trenton, New Jersey. Neither of the witnesses resided there, but it appeared that they had seen the property, had heard the other testimony as to the cost of the land, the building and the tools and machinery, and were conversant in a very large way with the general business for which the plaintiff intended the property to be used and the cost of such plants. Both witnesses had large experience in the rubber business, and were familiar with the character and capacity of the various plants for producing the article throughout the country, but it did not appear that they had any knowledge of the local market for real estate at Trenton, where the plant in question was situated. Courts cannot ignore modern conditions of business which affect the value of property. We know, for instance, that the value of a factory for the refine-

ment or manufacture of sugar, oil or even rubber, cannot be determined with reference to the market for such property in the locality where situated. If values in such cases could be made to depend upon the wants of the local markets, much valuable property would be sacrificed, or, at least, underestimated. In many cases it would be found that there is practically no local market for real estate of this character. The particular location of this factory had very little to do with its value. That was dependent upon conditions entirely outside of the locality and growing out of the character of the business and the methods by which it is conducted. To an individual or even a local corporation the property might be worth very little, while one of the great corporations or combinations, by means of which business of this character is now conducted, would readily pay a fair price for it. It would, therefore, be unjust to limit the plaintiff's measure of damages to the nominal value in the market of Trenton, when it appears that it had a greater value in a much wider market. Since it appears that the business for which it was to be used is conducted by corporations outside of that city, operating throughout the country generally, or at least large sections of the country, the market in which the value was to be ascertained must be deemed to be coextensive with the field of their operations. Therefore, whether these witnesses had qualified themselves to express an opinion with reference to the value of the property in controversy was a question of fact to be determined by the referee in the first instance, and it is clear that the evidence justified his decision. (*Slocovich v. Orient Mut. Ins. Co.*, 108 N. Y. 56; *Nelson v. Sun Mut. Ins. Co.*, 71 id. 453; *Perkins v. Stickney*, 132 Mass. 218; *Spring Co. v. Edgar*, 99 U. S. 658; *Stillwell & B. Mfg. Co. v. Phelps*, 130 id. 520; *Montana Railway Co. v. Warren*, 137 id. 353; *I. & S. Coasting Co. v. Tolson*, 139 id. 559.) There was evidence with respect to the competency of the witnesses, and the decision of the referee upon the question is not reviewable in this court, not because the decision of the court below was unanimous, but upon general and well-settled principles of

law. The effect of a unanimous decision is limited to the facts in the case put in issue by the pleadings, and to the evidence to sustain such facts, and has no application to collateral questions arising at the trial, such as the qualifications of a witness to express an opinion or a juror to sit in the case. It follows that the defendant's appeal cannot be sustained.

It seems to me that the argument of the learned counsel for the plaintiff in support of his appeal from the decision below, on the question of interest, cannot be successfully answered. It would not be profitable, however, to discuss the question now upon principle or authority, since it has very recently occupied the attention of the court. (*Gray v. Central R. R. Co. of N. J.*, 157 N. Y. 483.) In that case it was admitted that a party was entitled to recover interest as part of the damages for breach of an executory contract for the sale of property when the property sold had a market value at the time of the breach, but as the subject of the sale was an old ferryboat that had no market value, it was held that the action of the court below in striking out the item of interest was proper. In the present case the referee held that the property had a market value at the time of the breach, and assessed the damages accordingly. I am unable to see how the court can hold that the referee committed an error of law in allowing interest on the damages from the date of the breach, since the facts found by him have not been disturbed by the court below. The question of damages was the only issue in the case, and the only ground upon which this court can deny interest to the plaintiff is that the defendant, when sued, could not ascertain how much she was bound to pay for her breach of the contract. The same answer is available to a defendant in every case; but whatever force it once had, it is clear that it has none now, since, by statute, a defendant, when sued upon such a claim, may serve with the answer an offer to liquidate the damages at a specified sum, and, unless the recovery is for a larger sum, he may not only defeat all claim for interest, but recover from the plaintiff the expenses incurred in defending on the question of damages

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against a claim for a larger measure of damages. (Code, §§ 736, 737.)

But quite apart from the fact that in every action against the vendor of real property for damages arising from the breach of an executory contract of sale, it must be shown that the property has a market value exceeding the contract price in order to justify a finding of any damages whatever, the plaintiff's right to interest in this case rests upon other grounds still more difficult to answer.

When the plaintiff tendered the purchase price, he had fully performed the contract, and, as we have seen, became in equity the owner of the property and entitled to the rents and profits, the defendant holding the legal title as his trustee. The conveyance by the defendant to a third party in violation of her agreement and of the trust, deprived the plaintiff of the rents and profits to which he was entitled, and the law will give him indemnity for this loss by awarding interest as a substitute. (*Worrall v. Munn, supra*; *Bostwick v. Beach, supra*.) The only inquiry involved in this feature of the case is whether the referee committed any legal error in awarding interest to the plaintiff. I think it is difficult, if not impossible, to show that he did. If these views are correct, the judgment should be affirmed on the defendant's appeal, reversed on the plaintiff's appeal, and the judgment entered on the report of the referee affirmed.

GRAY, LANDON, CULLEN and WERNER, JJ., concur with HAIGHT, J.; PARKER, Ch. J., votes for affirmance because he is unable to distinguish this case from that of *Gray v. C. R. R. Co. of N. J.* (157 N. Y. 483); O'BRIEN, J., reads opinion in affirmance of the referee including interest.

Judgment affirmed.

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JOHN C. LIGHTHOUSE, Respondent, v. THE THIRD NATIONAL BANK OF BUFFALO, and SETH W. WARREN, as Receiver of the FARMERS AND MECHANICS' BANK OF BUFFALO, Appellants, Impleaded with Others.

1. SPECIFIC PERFORMANCE OF CONTRACT — SUBJECT-MATTER NOT IDENTIFIED. Specific performance of a contract for the purchase of bark cannot be ordered when the bark to be delivered on the contract is an unascertained and unidentified portion of a larger quantity.

2. LIEN OR EQUITY OF PURCHASER IN CASE OF UNIDENTIFIED PROPERTY. The use of part of the proceeds of notes given on the purchase of a specified quantity of bark, to pay, without the purchaser's knowledge or direction, certain "peeling" charges on bark of a third party who, by an independent contract with the seller had agreed to deliver to the purchaser the agreed quantity of bark, when that has not been ascertained or identified, but remains part of a greater quantity, does not create any lien upon or equity in the bark in favor of the original purchaser, as against a subsequent purchaser from the third party, who takes it only for an antecedent indebtedness; but the transfer is simply a preference of one creditor over another.

Lighthouse v. Third National Bank, 25 App. Div. 630, reversed.

(Argued February 6, 1900; decided March 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered February 19, 1898, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at an Equity Term.

On or about June 23, 1893, the Morrison Run Lumber Company, a copartnership, entered into a contract with the plaintiff by which the former agreed to deliver to the latter one thousand cords of good, merchantable bark on board W. N. Y. & P. R. R. cars at Rochester, at the rate of five cars per week, commencing not later than July 15, 1893, for which the plaintiff agreed to pay seven dollars and fifty cents per cord of twenty-two hundred pounds. Payments were to be made in the following manner: "Three notes of one thousand dollars each, dated June 28, 1893, given as an advance payment on the above-mentioned bark; the sum of three dol-

lars per cord to be deducted from the full amount until enough has been delivered to pay the above notes; the balance, four dollars and fifty cents, to be paid on the 10th of each month for all bark shipped the previous month." This contract was agreed upon at Rochester between one Droney, the agent of the Morrison Run Lumber Company, and the plaintiff. The contract was drawn in duplicate. One copy thereof was signed by the plaintiff, and Droney took both copies to French, the president of the Morrison Run Lumber Company, for signature. At the same time the plaintiff gave to Droney his three promissory notes, dated on that day, for one thousand dollars each, the first of which was payable in sixty days and the other two in three months from the date thereof, to the order of said Morrison Run Lumber Company, at the Exchange National Bank of Olean, N. Y. Droney took said contract and notes to said French, and the latter, before executing the contract with the plaintiff, procured a contract from the United Lumber Company of Liberty, Pa., in the following form:

"This memorandum witnesseth that the United Lumber Company of Liberty, Penna., have sold to the Morrison Run Lumber Company, to be delivered to J. C. Lighthouse, of Rochester, N. Y., One thousand (1000) cords of bark of this year's peeling, on the jobs of Duncan McRea, and the said Duncan McRea is hereby empowered and authorized to act for the said United Lumber Company and make deliveries of the same according to orders of the Morrison Run Lumber Company, and to deliver to them the one thousand (1000) cords of bark as soon as it is peeled in excess of the one-fourth of the bark to be delivered to A. Healey & Sons.

"Shipments of said bark to be made at the rate of from two to five cars per week, beginning on or before July 15th hereafter, the said Morrison Run Lumber Company hereby assuming to pay upon the said bark the bills that will be due the said Duncan McRea for peeling and loading the same, which shall not exceed three dollars and twenty-five cents (\$3.25) per

cord, and shall account to J. C. French for the remainder of the proceeds of the bark at the rate of seven dollars and fifty cents (\$7.50) per cord, delivered F. O. B. cars, Rochester, N. Y., as per sale to J. C. Lighthouse. To all of which we mutually agree.

“UNITED LUMBER COMPANY,

“G. D. BRIGGS, *President*.

“MORRISON RUN LUMBER COMPANY.

“I hereby consent to the sale of one thousand (1000) cords of bark to the Morrison Run Lumber Company, as above set forth.

“J. C. FRENCH.”

Immediately upon the execution of the last-mentioned contract said French, for and on behalf of the Morrison Run Lumber Company, signed the contract with the plaintiff and mailed it to him. On or about June 30th the notes delivered by the plaintiff to said Droney for the Morrison Run Lumber Company were discounted, and out of the proceeds thereof said French paid to McRea eighteen hundred and twenty-five dollars (\$1,825.00). At this time there were more than one thousand (1,000) cords of bark peeled and corded on what is known as the “Boody lands” in McKean county, Pa., which are the same lands referred to in the contract between the United Lumber Company and the Morrison Run Lumber Company as “the jobs of Duncan McRea.” None of the bark mentioned in either of said contracts was ever delivered to the plaintiff. On June 30th, 1893, and until August 30th, 1893, the Morrison Run Lumber Company, which was owned by French, and the United Lumber Company, which was practically owned by Adelpha C. Briggs, were largely indebted to the defendants, the Third National Bank of Buffalo, and the Farmers and Mechanics’ Bank of Buffalo, N. Y., for loans and advances theretofore made by said banks upon notes then held by them. In the month of August the officers of said banks began pressing the said United Lumber Company and the Morrison Run Lumber Company for payment or security. On August 30th, 1893, French gave to the Farmers and

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Mechanics' Bank a written instrument by which he transferred to it all his rights in and to certain contracts for the purchase and sale of hemlock timber bark and other timber and lumber, made between Adelpa C. Briggs and others and himself on January 11, 1892, and "all interests or rights I may have in any trees, lumber, bark upon the tract of land in the townships of Liberty and Norwich, McKean County, Pa., the title to which is in Adelpa C. Briggs."

On the 31st day of October, 1893, the Morrison Lumber Company, which was a corporation as distinguished from the Morrison Run Lumber Company, the copartnership above mentioned, executed and delivered to the defendants, the Third National Bank of Buffalo, and the Farmers and Mechanics' Bank of Buffalo, N. Y., a deed of the lumber standing or lying upon certain lands in the townships of Liberty and Norwich, McKean county, Pa., which embrace the lands upon which the bark peeled by said Duncan McRea was corded; excepting and reserving therefrom all the merchantable hemlock bark on said lands and all the rights of the United Lumber Company and A. C. Briggs, as set forth in said contract bearing date January 11, 1892.

On or about the 1st of November, 1893, the said Adelpa C. Briggs and her husband executed and delivered to said banks a deed conveying the said Boody lands; and by a separate instrument in writing bearing even date therewith the said Adelpa C. Briggs and her husband transferred to said banks all of their right, title and interest in and to all mill property, machinery, logs, lumber and bark, and other personal property on said lands.

The notes given by the plaintiff as aforesaid passed into the hands of *bona fide* holders, and the plaintiff was compelled to pay the same at maturity. Under the several transfers made to said banks as aforesaid, they took possession of the lands therein described and of all the bark on said lands. The plaintiff made several demands upon said banks for the bark which he claimed to own or have an interest in, and upon their refusal to deliver it to him he brought this action.

The further facts, so far as they are material, will appear in the opinion.

Adelbert Moot for appellants. The contract between French and Briggs furnishes no legal reason why Lighthouse should have a judgment against the banks. (*Lawrence v. Fox*, 20 N. Y. 268; *Kelly v. Roberts*, 40 N. Y. 432; *Turk v. Ridge*, 41 N. Y. 201; *K. L. Ins. Co. v. Nelson*, 78 N. Y. 137; *Southwick v. F. N. Bank*, 84 N. Y. 420; *People v. Dennison*, 84 N. Y. 272; *Dunning v. Leavitt*, 85 N. Y. 35; *Crowe v. Lewin*, 95 N. Y. 423; *Garnsey v. Rogers*, 47 N. Y. 242; *Vrooman v. Turner*, 69 N. Y. 285.) The equities of the banks are superior to those of Lighthouse. (Pon. Eq. Juris. § 1235.) The court erred in granting plaintiff judgment on a cause of action not alleged, and on the ground of fraud. (*Southwick v. F. N. Bank*, 84 N. Y. 420; *People v. Dennison*, 84 N. Y. 272; *K. L. Ins. Co. v. Nelson*, 78 N. Y. 137.) There is no ground for judgment for Lighthouse against the banks in this case. (*Shindler v. Houston*, 1 N. Y. 261; 2 Kent's Com. 492-496, 504.)

Walter S. Hubbell for respondent. The plaintiff was entitled to recover of the banks because the bark was transferred to the banks solely as collateral security for a pre-existing indebtedness, and nothing was advanced by the banks on the faith of the transfer. (*Macauley v. Smith*, 132 N. Y. 524; *Sargent v. E. S. A. Co.*, 46 Hun, 19.) The defendants, the banks, had notice of plaintiff's claim before the bark was delivered to them and, therefore, acquired no title as against it. (*Kimberly v. Patchin*, 19 N. Y. 330.) As Briggs retained possession of the bark until it was transferred to the banks and they took possession, Lighthouse and French got neither title, lien nor possession. (*Joyce v. Adams*, 8 N. Y. 291; *Anderson v. Read*, 106 N. Y. 333; *Blossom v. Shotter*, 59 Hun, 481; 128 N. Y. 679.)

WERNER, J. The learned trial court found the facts substantially as above stated. Upon these facts it based the legal

conclusion, "that the transfer to the defendant banks, by the said John C. French and Adelpa C. Briggs, of the said bark upon the said Boody lands, peeled by said Duncan McRea under his contract with the United Lumber Company, was subject to whatever right the plaintiff acquired therein by the advance payment made by him upon the agreement to purchase 1,000 cords of bark of the Morrison Run Lumber Company, and the payment to Duncan McRea of \$1,825 of the proceeds of the discount of the plaintiff's notes to apply on his contract for the peeling of said bark. And that, to the extent of the said sum of \$1,825, such transfer was in fraud of the plaintiff's right so acquired, which was the right to compel the specific performance of the contract between the Morrison Run Lumber Company and the United Lumber Company to the amount advanced by the plaintiff and actually paid to said McRea."

"That the plaintiff is entitled to judgment against the defendant banks, the Third National and Farmers and Mechanics' Banks, setting aside the transfer so made to them of the bark, to the extent of the said sum of \$1,825, paid by the Morrison Run Lumber Company to said McRea, and that the plaintiff have judgment against said banks for the sum of \$1,825, part proceeds of the sale of said bark by them."

The Appellate Division unanimously affirmed the judgment entered upon the decision of the trial court, and we are, therefore, compelled to accept the facts as found.

This case presents a practical illustration of the difficulties with which courts are beset in the attempt to apply equitable principles to ill-considered and hastily-executed contracts. It would have been possible for the plaintiff to have made a contract under which the title to the bark bargained for passed at once. The identity of the subject-matter of the contract might have been so clearly fixed as to have left nothing to chance or doubt. If, in the nature of things, both of these precautions were impracticable, the plaintiff might still have exacted from French some security for the advances made upon the contract. As neither of these things were done, it

is our duty to ascertain whether the plaintiff, under the contract which was made, acquired any rights, either legal or equitable, which can be upheld under the judgment herein. In the pursuit of this inquiry we must take the contract between the plaintiff and the Morrison Run Lumber Company as it was made. The desire to reach a result which will accord with the apparent equities of the case will not permit us to clothe the contract with conditions and characteristics that are foreign to it. The trial court correctly decided that the contract was executory. There was no change of title at the time of its execution. This necessary conclusion is based upon the coincidence of absence of title in the vendor; and the lack of such identification and appropriation of the subject-matter of the contract, as is essential to the passage of title. The plaintiff's executory contract with the Morrison Run Lumber Company was subsidiary to an executory contract between the latter and the United Lumber Company. Neither the plaintiff nor his vendor could acquire title to any bark under either of said contracts until something was done by way of identification or appropriation that would render the amount of bark specified in the contracts capable of delivery. Under the finding of the trial court further discussion of this feature of the case is superfluous, and we have alluded to it simply to show that *Kimberly v. Patchin* (19 N. Y. 330), cited by respondent's counsel, and kindred cases, have no application to the case at bar.

If the plaintiff, by virtue of his contract with the Morrison Run Lumber Company, did not take title to the bark therein described, what interest did he acquire therein? The learned trial court seems to have proceeded upon the theory that the plaintiff, by virtue of his contract with the Morrison Run Lumber Company, became vested with the right to a specific enforcement, for his benefit, of the contract between the latter company and the United Lumber Company. By way of preface to what we shall have to say upon this subject, we may assume, although we do not decide, that this is a case in which the discretion of the trial court might have

been properly exercised in decreeing specific performance if, upon the facts established, the Morrison Run Lumber Company could have enforced specific performance of its contract with the United Lumber Company. This assumption is predicated upon the rules laid down in *Johnson v. Brooks* (93 N. Y. 337); *Williams v. Montgomery* (148 N. Y. 519), and *Matter of Argus Co.* (138 N. Y. 557), to the effect that in general a court of equity will not take upon itself to make such a decree, where chattel property alone is concerned, although its jurisdiction to do so is no longer to be doubted, and it is believed that no good reason exists against its exercise in any case when compensation in damages would not furnish a complete and satisfactory remedy. But could the Morrison Run Lumber Company have enforced specific performance against the United Lumber Company? Clearly not. The contract between these two companies was hardly more specific in its designation and appropriation of the subject-matter than the contract between the plaintiff and the Morrison Run Lumber Company. Under the plaintiff's contract any 1,000 cords of good merchantable bark would have satisfied the specifications. Under the other contract the bark was to be of that year's peeling on the jobs of Duncan McRea. In the absence of any finding we may assume that McRea's jobs were confined to the Boody lands. But upon those lands there were five hundred piles of bark containing in the neighborhood of two thousand cords of bark. A. Healey & Sons were first entitled to one-fourth of the same, and then out of the balance, which we may also assume amounted to about fifteen hundred cords, the United Lumber Company had agreed to sell to the Morrison Run Lumber Company one thousand cords, to be delivered to the plaintiff. Could the Morrison Run Lumber Company have insisted upon the delivery to Lighthouse of any specific one thousand cords of that bark? We think not. Any one thousand cords of bark taken from the large amount upon those lands would have satisfied the terms of the contract. The only substitute for a manual delivery of a parcel of personal property mixed with an ascertained and defined larger

quantity consists of such an identification of the same that the purchaser can take it. (*Stephens v. Santee*, 49 N. Y. 35; *Riendeau v. Bullock*, 48 N. Y. S. R. 876; *Foot v. Marsh*, 51 N. Y. 288; *Bacon v. Gilman*, 57 N. Y. 656, and *Kein v. Tupper*, 52 N. Y. 550.) There was here no such identification of the property as would have enabled the Morrison Run Lumber Company to take it. There was, therefore, no sale, and there could be no specific performance so long as this essential requisite of the contract remained unperformed. But it seems to have been assumed by the learned trial court that the plaintiff was clothed with certain equities which were superior to those possessed by his vendor. What had he done that had been omitted by his vendor? The answer is that the Morrison Run Lumber Company used \$1,825.00 of the proceeds of his notes to pay for the "peeling" charges upon said bark. It will be observed that this circumstance could have no possible influence upon the questions whether title passed or specific performance could be enforced. If such payment had been made pursuant to an agreement, either express or implied, between all parties interested in, and to be affected by, the transaction, it might have created an equitable lien in favor of the plaintiff. But in the absence of a sufficient identification or appropriation of any specific 1,000 cords of bark, such a lien would have attached to all the bark on said lands, and not simply to a part thereof. It is not claimed that there was any such agreement.

We must, therefore, look for plaintiff's superior equities in another direction. The decision seems to imply that by such application of a part of the moneys produced by plaintiff's notes, the plaintiff acquired an equitable lien upon said 1,000 cords of bark. But here we meet the same obstacle, which stands in the way of a completed sale or specific performance. One of the first essentials to the creation of an equitable lien is the specific thing or property to which it is to attach. "Though possession is not necessary to the existence of an equitable lien, it is necessary that the property or funds upon which the lien is claimed should be distinctly traced, so that

the very thing which is subject to the special charge may be proceeded against in an equitable action and sold under decree to satisfy the charge." (Jones on Liens, sec. 34, and *Grinnell v. Suydam*, 3 Sandford, 132.)

The difficulties referred to, which prevent an affirmance of the judgment herein, all arise upon the assumption that there is some legal or equitable connection between the contracts under consideration. But when they are viewed from the true perspective there are other circumstances than those adverted to, which are inconsistent with the existence of an equitable lien in favor of the plaintiff. His contract was with the Morrison Run Lumber Company. The bark he was entitled to receive under it might have been produced from other places than the "Jobs of Duncan McRea." The assumption of the Morrison Run Lumber Company to pay McRea's "peeling" charges was part of another contract in which the plaintiff had no interest, and the use of a part of the proceeds of his notes to pay such charges was without his knowledge or direction.

There was no express agreement for such a lien, and the circumstances were not such as to create one by implication. Upon the facts before us it is precisely as though the Morrison Run Lumber Company had used other moneys to pay the charges of McRea. In this connection it is to be remembered that the thing upon which the plaintiff's claim to a lien is predicated is chattel property, and not a fund which is incapable of actual delivery. The distinction to be observed is well stated in *Clemson v. Davidson* (5 Binn. [Pa.] 392): "Any order, writing or act which makes an appropriation of a fund, amounts to an equitable assignment of that fund. The reason is plain; the fund being neither assignable at law nor capable of manual possession, an appropriation of it is all that the nature of the case admits. A court of equity will, therefore, protect such appropriation, and consider it equal to an assignment. But very different is the case of a parcel of flour, which admits of actual delivery. Every man who purchases an interest in property of this kind ought to take immediate possession; if he does not, he is guilty of negligence and can

have no equity against a third person who contracts with the actual possessor without notice of a prior right."

The learned counsel for the respondent dwells with considerable emphasis upon the fact that the sole consideration for the transfers to the banks was an antecedent indebtedness. If the plaintiff had neither title to nor lien upon the bark transferred to the banks, the former and the latter stood upon an equal footing. Both were mere creditors at large of the two lumber companies, and a transfer to either for an existing indebtedness would be good as against the other. As stated in *Seymour v. Wilson* (19 N. Y. 417): "When the equities are equal the legal title must prevail." The transfer of the bark to the banks was simply the preference of one creditor over another. (*Murphy v. Briggs*, 89 N. Y. 446.) We have discussed at length every possible phase of this case in the hope that some suggestion would arise which would enable us to render a decision in accordance with the apparent equities of the case; but an analysis of the facts in the light of controlling principles has convinced us that these equities are more apparent than real.

This is simply a case where the confidence of one of the parties to a contract has been abused by the other. Instead of transferring to the plaintiff at least enough of this bark to reimburse him for the advancements made upon his contract, the defendant French conveys all his interest in the bark to another creditor. Similar transactions are constantly taking place in the commercial world, and they create only the ordinary relation of creditor and debtor — nothing more.

As it is possible that a more minute inquiry into the facts upon another trial may show a different legal status; and as in any event, the plaintiff is entitled to judgment against the defendant French, who is really the Morrison Lumber Company, the judgment of the court below should be reversed and a new trial granted, with costs to abide the event.

PARKER, Ch. J., GRAY, HAIGHT, LANDON and CULLEN, JJ., concur; O'BRIEN, J., dissents.

Judgment reversed, etc.

JOHN W. HOWARD et al., Respondents, v. AMERICAN MANUFACTURING COMPANY, Appellant.

CONTRACT — STIPULATED TEST OF MACHINERY EXCUSED WHEN THE OTHER PARTY FAILED TO FURNISH THE POWER AS AGREED. Where a contractor agreed to furnish and erect air propellers for removing smoke from the tempering room of a manufacturing company, to run with power furnished by the company, the work of construction to be performed to the satisfaction of the engineer of the company, and subject to its approbation after a thirty days' trial, and the contractor having obtained the certificate of the engineer that the apparatus was properly constructed, but such trial could not be made because the company failed to furnish the power, the contractor is relieved from such test and is entitled to recover the contract price, under the rule that where the obligation of one party to perform is dependent upon prior action by the other, the refusal of the latter to perform dispenses with the obligation of the former.

(Argued February 16, 1900; decided March 27, 1900.)

APPEAL from a judgment of the General Term of the Superior Court of the city of New York, entered December 30, 1895, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial without a jury.

This action was brought to recover the contract price of three Blackman air propellers, erected by plaintiffs upon defendant's premises, the defendant having refused to pay the same upon the ground that the propellers have not performed the work for which they were erected.

The facts, so far as material, are stated in the opinion.

Charles Edward Souther for appellant. All prior and contemporaneous negotiations and oral promises in reference to the same subject are merged in the written contract, and the rights and duties of the parties are to be determined by that instrument. When that has been executed it is then conclusively presumed that it contains the whole engagement of the parties. (*Engelhorn v. Reitlinger*, 122 N. Y. 76, 81; *Crouch v. Gutmann*, 134 N. Y. 45; *Romeyn v. Sickles*, 108 N. Y. 650.) The propriety of a nonsuit must be regarded as though the motion for it had been made at the close of the

case, the additional evidence after its denial, furnished by the plaintiff, being taken into account. (*S. & S. P. R. Co. v. Thatcher*, 11 N. Y. 102; *McCotter v. Hooker*, 8 N. Y. 497; *Jackson v. Leggett*, 7 Wend. 377; *Tiffany v. St. John*, 65 N. Y. 314.) In an action tried by the court and governed by the Constitution and Code as they existed in February, 1894, "a refusal to make any finding whatever, upon a question of fact, where a request to find thereupon is seasonably made by either party * * * is a ruling upon a question of law." (Code Civ. Pro. §§ 993, 1337; *Kennedy v. Porter*, 109 N. Y. 526.)

Francis H. Wilson for respondents. It was no part of plaintiffs' contract to repair the defendant's defective shafting. This was defendant's duty; and as its failure to do so prevented plaintiffs from demonstrating that the fans could remove the smoke as agreed, they were entitled to recover the contract price. (*Byron v. Mayor, etc.*, 7 N. Y. S. R. 17; *Bogardus v. N. Y. L. Ins. Co.*, 101 N. Y. 328; *Niblo v. Binsse*, 3 Abb. Ct. App. Dec. 375; *Gallagher v. Nichols*, 60 N. Y. 438, 448; *Wyckoff v. Myers*, 44 N. Y. 143; *Mansfield v. N. Y. C. & H. R. R. Co.*, 102 N. Y. 205.) It is no defense to plaintiffs' right to recover that the certificate does not cover the thirty days' approbation. Plaintiffs need only prove the fact of substantial performance. Even where a certificate is required by the terms of the contract and it can be shown that such certificate is unreasonably withheld, the work having been performed, it is no bar to plaintiffs' right to recover. (*Nolan v. Whitney*, 88 N. Y. 648; *Thomas v. Fleury*, 26 N. Y. 32; *Stewart v. Keteltas*, 36 N. Y. 392; *Heckmann v. Pinkney*, 81 N. Y. 211.)

PARKER, Ch. J. This action was tried before the court, a jury having been waived. Both parties presented requests to find. Findings were made to the effect that on or about the fifth day of December, 1890, the plaintiffs contracted with the defendant to furnish and erect in the tempering room of its

manufactory three Blackman Air Propellers, arranged to run on a vertical shaft, which were to discharge the air and smoke through existing inlets to the smokepipe leading to the chimney, plaintiffs to take the necessary power which the defendant company was to furnish from a line of shafting that, at the time of the making of the contract was on the wall of the tempering room, and to complete the entire work and leave it in complete running order for a consideration of \$487, which was to have been paid by the defendant when the work had been done, to the satisfaction and approval of its architect, subject to its approbation after thirty days' trial.

The defendant requested the court to find that the plaintiffs had not performed their contract in that they omitted to furnish the necessary shafting and pulleys to communicate sufficient power to the shafting in defendant's tempering room, by reason whereof the apparatus had not effected the removal of smoke from the room, and that the probationary period of thirty days provided for in the contract had not at the time of the commencement of the action actually begun. This request the court refused and instead found that the defendant neglected to furnish sufficient power to drive the propellers; that the work of construction had been done to the satisfaction of the mechanical engineer whose certificate of approval was provided for in the contract; and that he had so certified, but was prevented from giving his certificate of approval as to the effectiveness of the propellers in removing smoke by reason of the defendant's failure to supply the necessary power to run the propellers.

As this action was tried in February, 1894, the Code as it then existed governs the practice, and the appellant is right in insisting that a refusal to make any findings whatever upon a question of fact material to the issue, where a request to find was seasonably made, was a ruling upon a question of law and an exception taken thereto presents a question reviewable by this court. (*Kennedy v. Porter*, 109 N. Y. 526.) Complaint cannot be made of the refusal of the court to make the finding in its entirety, because it appears in other findings that

the apparatus had not effected the removal of the smoke, the requisite power to enable the propellers to do the work for which they were intended not having been supplied, and the latter part of the request the defendant was not entitled to. As the finding requested is broader than the defendant was entitled to, and for other reasons, the court was right in declining to find it, even though it contained some facts which the defendant would have been entitled to have found had they stood alone. If, however, we treat it merely as a request to find as an independent fact that the plaintiffs failed to furnish, as was their duty, the necessary shafting and pulleys to communicate sufficient power to the shafting in defendant's tempering room, the record does not permit us to say that it was error to refuse to find it.

At the outset of the negotiations, Mr. Wolff, who had been the defendant's mechanical engineer, requested the plaintiffs' representative to meet him at the defendant's factory to consider appliances for removing smoke from its tempering room. The power in the factory had all been put in under the direction of Wolff, who, after consultation with an officer of the defendant company and the plaintiffs' representative, decided to take the power from a certain line of shafting, the only line of shafting in the tempering room; the plaintiffs made the necessary connection with the shafting at the point indicated, and so completed their work in point of construction as to meet the approval of Wolff; but when the fans were started the defendant's shafting broke down, and a controversy at once arose between the parties as to whether the plaintiffs were obliged to furnish additional, or, if necessary, entirely new shafting to run the propellers, or whether they had performed their work when they made connection with the shafting in the defendant's tempering room at the point where it had been decided to make it when the negotiations were entered into which resulted in the contract. After an examination of the evidence on that subject we have reached the conclusion that the trial court was warranted in finding that the plaintiffs had performed their part of the contract when

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they properly made connections with the shafting at the point agreed upon.

Now, it is true, as the appellant insists, that the propellers have not removed the smoke from the tempering room as the plaintiffs contracted they should, nor has the defendant, after thirty days' trial, approved of them, for there has not been a thirty days' trial, the propellers not having been run at all. But the plaintiffs obtained the certificate of the engineer that the apparatus had been properly constructed, and in view of the finding of the court that operation was prevented only by the failure of the defendant to furnish power as it had contracted to, they did all that they could do until after performance of the obligation of the defendant to furnish the needed power. The situation, therefore, is within that principle of law applicable to the construction of contracts, that when the obligation to perform some act by one party is dependent upon some prior action by the other party to the contract, the refusal of the latter to perform dispenses with the obligation of the former. Applying that principle, our conclusion is that the court below was right in holding that the plaintiffs, having constructed the appliances to the satisfaction of the engineer, the defendant could not refuse payment of the contract price on the ground that the propellers had not removed the smoke from the tempering room for the period of thirty days or to its satisfaction, such ground being supplied through its own failure to furnish the necessary power as agreed.

The judgment should be affirmed, with costs.

GRAY, O'BRIEN, HAIGHT, LANDON, CULLEN and WERNER, JJ., concur.

Judgment affirmed.

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CHARLES H. HEIMBURG, Appellant, v. THE MANHATTAN RAILWAY COMPANY et al., Respondents, Impleaded with Another.

1. ELEVATED RAILROADS — CONSENT OF ABUTTING OWNER AS AN ESTOPPEL. The written consent of a mere abutting owner to the construction and operation of an elevated railroad in the street in front of his premises is a complete answer to his subsequent action in equity to restrain the operation of the road, and where the trial court, ignoring the consent, awards him damages and the usual injunction, a judgment of reversal below must be affirmed in the Court of Appeals.

2. APPEAL — CHANGE OF POSITION NOT PERMISSIBLE. Where the owner has claimed upon the trial that the written paper was insufficient as a consent, he cannot, after a judgment in his favor has been reversed below, change his position and ask the Court of Appeals to examine the evidence in order that it may find some fact to overcome the paper or answer the decision of reversal.

3. CONSENT — NOT IMPAIRED BY REFUSAL OF NECESSARY NUMBER OF OWNERS. Where the road has been constructed and is in operation, an abutting owner, who consented to the construction thereof, cannot maintain an action to restrain the operation thereof on the ground that the corporation was forced to procure from the General Term consent to construct for the reason that the necessary number of owners would not consent, as the consents are good as far as they go, and the corporation has a right to insist upon every authority which it had for the construction of the road.

Heimbürg v. Manhattan Ry. Co., 19 App. Div. 179, affirmed.

(Argued February 6, 1900; decided March 27, 1900.)

APPEAL from a judgment and order of the Appellate Division of the Supreme Court in the first judicial department, entered July 1, 1897, reversing a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term, and dismissing the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

Henry A. Forster and *John A. Weekes, Jr.*, for appellant. The reversal of the judgment and the dismissal of the complaint can only be sustained on the ground that the case

involved nothing but a pure question of law; if any question of fact was involved, or might possibly be involved on a new trial, or if conflicting inferences arise from the uncontradicted parol testimony, the Appellate Division had no power to reverse the judgment and award judgment absolute against the party who prevailed in the lower court. (*Heller v. Cohen*, 154 N. Y. 299; *Benedict v. Arnoux*, 154 N. Y. 715; Code Civ. Pro. § 1338; *Bonneisler v. Forster*, 154 N. Y. 229; *Snyder v. Seaman*, 157 N. Y. 449; *Cudahy v. Rhinehart*, 133 N. Y. 248.) The fact that the plaintiff wrote at the end of a statutory consent to the construction and operation of the elevated railroad the words: "If the road must be on Third avenue, I prefer the middle," and then signed the underwriting in reliance on false representations, is not a defense to this action. (*Koehler v. N. Y. E. R. R. Co.*, 9 App. Div. 450; 159 N. Y. 221; *Matter of N. Y. E. R. R. Co.*, 70 N. Y. 327; L. 1875, ch. 606, § 4; *Roberts v. N. Y. E. R. R. Co.*, 155 N. Y. 32; *Haviland v. Willets*, 141 N. Y. 35, 50, 51; 1 Story Eq. Juris. [13th ed.] §§ 121, 122; Kerr on Fraud & Mistake, 400, 401; *Hunt v. Rousmanier*, 8 Wheat, 214, 215; 2 Pom. Eq. Juris. [2d ed.] 1166, 1168, § 842, note; *Wheeler v. Smith*, 9 How. 55; *Lansdowne v. Lansdowne*, 2 J. & W. 205; *Busch v. Busch*, 12 Daly, 476; 102 N. Y. 672; *Cooper v. Phibbs*, L. R. [2 H. L.] 149; *Earl Beauchamp v. Winn*, L. R. [6 H. L.] 223; 7 Am. & Eng. Ency. of Law, 17; 1 Beach Mod. Eq. Juris. 41.)

William H. Godden and *Julien T. Davies* for respondents. The plaintiff and his grantee are precluded from maintaining this action by reason of Heimburg's written consent to the construction and operation of the defendants' elevated railway in Third avenue, in front of the premises in suit. (*White v. M. Ry. Co.*, 139 N. Y. 19; *Foote v. M. Ry. Co.*, 147 N. Y. 370; *Herzog v. N. Y. E. R. R. Co.*, 76 Hun, 486; 151 N. Y. 665; *Snell v. Leavitt*, 110 N. Y. 595; *King v. Murphy*, 140 Mass. 254; *Steere v. Tiffany*, 13 R. I. 568; *Curtis v. Noonan*, 10 Allen, 406; *Cartwright v. Maplesden*, 53 N. Y.

622; *White's Bank v. Nichols*, 64 N. Y. 65.) There is no element of fraud or misrepresentation present in the case to impair or vitiate the consent in question. (*Kain v. Larkin*, 131 N. Y. 300; *Morris v. Talcott*, 96 N. Y. 100; *C. Nat. Bank v. Koehler*, 17 N. Y. S. R. 23; 117 N. Y. 657; 1 Beach Mod. Eq. Juris. 72, 73; *Lavisarr v. Washburn*, 50 Wis. 200; *Marksbury v. Taylor*, 10 Bush, 519; *Chapman v. Rose*, 56 N. Y. 141; *Nat. E. Bank v. Veneman*, 43 Hun, 241; *N. A. & S. R. R. Co. v. Fields*, 10 Ind. 187; *Thornberg v. N. & D. R. Co.*, 14 Ind. 499; *Hendrick v. Toole*, 29 Mich. 340.)

O'BRIEN, J. The trial court awarded to the plaintiff the usual judgment in cases of this character, namely, an injunction to restrain the operation of the railway in the street in front of the plaintiff's premises and damages. The railway was constructed and is operated pursuant to legislative and municipal authority and, hence, it was incumbent upon the plaintiff to show that some of his property rights have been invaded by the defendants. His claim was that the easements of light, air and access appurtenant to his premises had been wrongfully taken, appropriated or impaired by the defendants in the construction and operation of the railway, since all that was done without his consent, and the trial court so found. But the learned court below upon appeal has reversed the judgment and dismissed the complaint evidently upon the ground that the finding at the trial that the railway was constructed and is operated without the plaintiff's consent was not only without evidence to sustain it, but was against the conceded facts of the case as disclosed by the record.

It is admitted that in October, 1875, the plaintiff executed and delivered an instrument in writing which appears in the record, which, in terms, expresses his consent to the construction and operation of the railway in front of his premises which are involved in this action. If this paper is to be given the legal effect which it was intended to have, then it is very plain that the defendants have done nothing that the plaintiff did not consent to, and, hence, it cannot be said that there was any

illegal invasion of the plaintiff's property rights. The finding of the trial court, that the railway was constructed and is now operated without the plaintiff's consent, is the sole foundation upon which the plaintiff's action rests. If the plaintiff did consent, then he has no cause of action either at law or in equity. The plaintiff had no title to any part of the street in front of his property. He was a mere abutter, and his written consent that the railway might be constructed and operated in front of his property is a complete answer to a suit in equity in his behalf or in behalf of his grantee to restrain the operation of the road, and so this court has held even where the party bringing the suit owned the fee of the street when the consent was given. (*Herzog v. N. Y. E. R. Co.*, 76 Hun, 486; *affd.*, 151 N. Y. 665, on opinion below; *White v. M. R. Co.*, 139 N. Y. 19.)

The learned counsel for the plaintiff has not been able to point out any legal error in the decision of the court below reversing the judgment of the trial court, which ignored the paper entirely and held virtually that the plaintiff's consent was no bar to the action. He insists now upon two propositions of fact, neither of which has been found in his favor. (1) That the consent has not been acted upon by the defendants; and (2) that in some way it is infected with fraud, duress or mistake. It would be quite sufficient to say in answer to these objections that they were not raised or discussed at the trial. The consent and all questions growing out of it were wholly ignored at the trial, not only by the court but by the plaintiff's counsel as well. He cannot now ask this court, after a reversal of the judgment upon appeal, on the ground that the writing constitutes a defense, to examine the evidence in order to find some fact to overcome the paper or to answer the decision below. His position at the trial was that the paper was insufficient as a consent, and that position he must maintain now. (*Martin v. Home Bank*, 160 N. Y. 199.)

But quite apart from any question of practice, it is quite obvious that even if the learned counsel for the plaintiff had

brought the circumstances to the attention of the trial court, the result would have been the same as it is now. The only proof upon which he bases the assertion that the defendants did not act upon the consent is the order of the General Term that the road should be constructed, made upon an application by the company, showing that the consent of the necessary number of property owners had not been procured. But the consents were good as far as they went, since the company to which they were given did in fact construct the road and put it in operation. It has the right now to insist upon every authority that it had, whether procured from the legislature, the municipality, the courts or the property owners, and it is not open to the plaintiff to invoke the power of a court of equity to restrain the operation of the road on the ground that, though he consented, yet the railway would have been constructed without it. Moreover, we cannot say that in the absence of the consents of parties owning a very large portion of the property on the line of the road the court would have made the order at all. The suggestion that the paper was the result of fraud or mistake is not supported by any evidence whatever. The plaintiff inserted in the paper before his signature these words: "If the road must be on 3d Avenue, I prefer the middle." If that is to be treated as a condition, which is the most favorable view for the plaintiff, then it is undisputed that it was complied with by the company in the construction of the road. There is no legal error in the decision below that would warrant this court in interfering with the judgment, and it must, therefore, be affirmed, with costs.

GRAY, HAIGHT, LANDON, CULLEN and WERNER, JJ., concur ; PARKER, Ch. J., not sitting.

Judgment and order affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
FRITZ MEYER, Appellant.

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1. MURDER—RIGHT TO TRIAL BY COMMON-LAW JURY—STATUTORY REGULATIONS—EXCLUDING COMPETENT PERSONS FROM JURY LIST. The accused is not denied his constitutional right to a trial by a common-law jury of twelve men merely because he is driven to the choice of his jurors from the general panel after the exclusion therefrom of competent persons, by reason of the fact that the commissioner of jurors has taken therefrom 2,500 men of presumably superior intelligence for a special jury list.

2. EVIDENCE—ADMISSIBILITY OF CONFESSIONS—DECIDED AS MATTER OF LAW. The admissibility in evidence of confessions may be decided by the trial court as a matter of law without submitting it to the jury, where there is absolutely no doubt on the question, though in other cases it is a question of fact to be decided by the jury under proper instructions.

3. VOLUNTARY CHARACTER OF CONFESSIONS—FEAR OR DURESS. Confessions may be held by the trial court as matter of law to have been voluntarily given, when there is nothing in the evidence, except the defendant's arrest and the fact that he was subjected to some physical violence at the hands of bystanders when he was being conveyed to the police station, that would furnish even a pretext for the claim that his confessions were not voluntarily made.

4. APPEAL—ERROR, WHEN NOT PREJUDICIAL. A judgment of conviction will be upheld even though it be assumed that a technical error was committed by the trial court in withholding from the consideration of the jury the question whether defendant's confessions were voluntary or not, when, under the circumstances of the case, the rulings of the court upon the confessions were not material because there was ample evidence outside of the confessions to sustain the verdict.

(Argued February 15, 1900; decided March 27, 1900.)

APPEAL from a judgment of the Supreme Court, rendered at a Trial Term for the county of New York November 23, 1897, upon a verdict convicting the defendant of the crime of murder in the first degree.

The facts, so far as material, are stated in the opinion.

O'Hare & Dinnean for appellant. The court erred, to the substantial injury of the defendant's rights, in overruling the challenge to the panel. (Code Crim. Pro. §§ 361-364;

Code Civ. Pro. §§ 1094-1097; L. 1899, ch. 623, § 1.) The evidence was insufficient to warrant a conviction of the defendant of the crime of murder in the first degree, viewing the killing as done either with design to take life, premeditated and deliberate, or in commission of a felony or of an attempt to commit a felony. (Penal Code, § 498, subd. 2.) The learned court erred in taking from the jury the question as to whether the alleged confession of the defendant to the witnesses Dangler, Herlihy and others was voluntary or under the influence of fear produced by threats. (*People v. Mondon*, 103 N. Y. 221; *People v. Chappleau*, 121 N. Y. 274; *People v. Kurtz*, 42 Hun, 335; *People v. Bishop*, 69 Hun, 105; *Willett v. People*, 27 Hun, 469; Code Crim. Pro. § 395.) Outside of the alleged confession there was no competent proof of the *corpus delicti*. (Penal Code, § 181; *People v. Beckwith*, 108 N. Y. 72; *People v. Palmer*, 109 N. Y. 113; *People v. Ledwon*, 153 N. Y. 10.)

Charles E. Le Barbier for respondent. The verdict of the jury was abundantly supported by the facts in the case and the case of the People proved to the satisfaction of the jury beyond a reasonable doubt. (*Leighton v. People*, 88 N. Y. 120; *People v. Conroy*, 97 N. Y. 77; *People v. Beckwith*, 103 N. Y. 368; *People v. Hawkins*, 109 N. Y. 408; *People v. Trezza*, 125 N. Y. 741; *People v. Cignarale*, 110 N. Y. 27; *People v. Wilson*, 141 N. Y. 185; *People v. Barberi*, 149 N. Y. 267; *People v. Benham*, 160 N. Y. 402.) All the essential elements of the crime of murder were made out and the jury justified in finding that the killing of the decedent was with premeditation and deliberation on the part of the defendant. (Penal Code, §§ 170-181, 183; *People v. Hill*, 19 N. Y. S. R. 672; *People v. Conroy*, 97 N. Y. 75; *People v. Majone*, 91 N. Y. 211; *People v. Decker*, 157 N. Y. 193; *People v. Kennedy*, 159 N. Y. 346; *Leighton v. People*, 88 N. Y. 117; *People v. Beckwith*, 103 N. Y. 361; *People v. Hawkins*, 109 N. Y. 408; *People v. Johnson*, 139 N. Y. 358; *People v. Constantino*, 153 N. Y. 24.) The defendant's

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exceptions to the admission of the statements of the defendant were not well taken. (*People v. Kennedy*, 159 N. Y. 346; *People v. McMahon*, 15 N. Y. 384; *People v. Wentz*, 37 N. Y. 303; *Teachout v. People*, 41 N. Y. 7; *Murphy v. People*, 63 N. Y. 590; *Cox v. People*, 80 N. Y. 500; *People v. McGloin*, 91 N. Y. 241; *People v. Mondon*, 103 N. Y. 211; *People v. McCallam*, 103 N. Y. 587.) The challenge to the panel of jurors summoned for the trial of this case cannot be sustained. (*People v. Dunn*, 157 N. Y. 528.)

WERNER, J. At a term of the Supreme Court, held in and for the county of New York on the 23d day of November, 1897, the defendant was convicted of the crime of murder in the first degree for the killing of one Frederick Smith, a police officer in the city of New York. The evidence which constitutes the case of the People discloses the following facts:

The church of the Most Holy Redeemer is situate on East Third street and Avenue A, in New York city. At the rear or Fourth street end of the church is the parochial school, which is so constructed and connected with the church building as to form a part thereof. Fronting on Third street is the rectory or priest's house, which is connected with the church by means of a hallway or corridor, and doors leading from the same into the church and rectory respectively. In the church, near the Third street entrances thereof, there were located four "poor boxes" or receptacles for the alms of those attending the services. Each of these boxes was connected by an electrical appliance with a bell or "burglar alarm" placed in a room in the rectory. On the night of the 26th of October, 1897, about ten minutes before midnight, this burglar alarm sounded and aroused Conrad Kirchhaff, otherwise known as "Brother William," who occupied that room on that night. He hastily dressed himself, and, going out upon the street, gave an alarm which was responded to by Police Officer Frederick Smith.

These two were immediately joined by Police Officer William N. Conklin, and one Otto Dengler, a citizen residing

opposite the church. They proceeded into the rectory, where they procured lights, and from thence into the church. An examination of the "poor boxes" disclosed that the first three were intact, but the fourth one, from which the alarm had proceeded, was found broken open, the door thereof lying upon the floor. Search was then made of the church. After going the whole length of the church, in separate aisles, the party came together at the altar, and at this juncture Officer Smith discovered that the door leading from the church into an alleyway which communicated with the schoolroom was open. He disappeared through that door, lantern in hand, and in about two minutes two distinct shots were heard from the direction of the schoolroom. Officer Conklin and "Brother William" at once entered the schoolroom and saw a human form retreating "head first" through the upper half of a door leading to Fourth street. Upon looking about the schoolroom they saw Officer Smith lying across two school desks, with his face downward, breathing heavily and bleeding. Officer Conklin ran to the door, the upper or glass part of which had been broken by the person who had jumped through the same, and shouted to some persons who had been attracted by the crashing of glass, "Stop that man." Thereupon Max Schmidt and Charles Vietze, two bystanders, seized the man, who was positively identified by Officer Conklin as the man whom he saw going through the window, and quite as positively identified by Schmidt and Vietze as being the defendant. Schmidt saw something in defendant's hip pocket which "glittered," and upon taking it out it proved to be a revolver. At the same time one Frank Henrich, another bystander, who saw the man coming out of the window, and identified the defendant as that man, pulled out of defendant's hand a long round package, which resembled in form and weight an instrument which was afterwards called a "jiminy." This instrument was given by Henrich to one Endres, who describes it as a "chisel." The latter gave it to one Insen, and he in turn gave it to a police officer. The revolver taken from the defendant by Schmidt was handed to Officer Conklin, who turned it over to Police Sergeant Diamond. The

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latter testified that it was a six-chamber revolver, and when it was delivered to him two chambers were empty and four were loaded. Other witnesses described it as a thirty-two calibre revolver. After turning the defendant over to Officer Ryan, Officer Conklin sent in a call for an ambulance. This was responded to at once. Upon arriving at the church the surgeon in charge of the ambulance found Officer Smith in a moribund condition, and within a few minutes he died. Such further facts as are material will be discussed in connection with the questions raised by this appeal.

After his arraignment, and before a jury was impaneled, the defendant interposed a challenge to the panel of jurors summoned for the term at which his case was tried. The grounds of challenge were, (1) "That the panel of jurors summoned for the trial of criminal causes in this court for the term commencing November 1, 1897, has been improperly, illegally and in contravention of defendant's constitutional right, drawn from an improper and illegal and insufficient list of trial jurors for the trial of causes in the city and county of New York, especially in that from such list of trial jurors, and in the drawing and summoning of this panel therefrom, there were illegally, improperly and in contravention of defendant's constitutional right, excluded therefrom, and not included or embraced therein, all persons selected by the special commissioner of jurors in and for the city and county of New York appointed by the Appellate Division of the Supreme Court for the first department, pursuant to chapter 378 of the Laws of 1896, entitled 'An act providing for a special jury in criminal cases, etc.,' and (2) That upwards of two thousand five hundred persons qualified to serve as trial jurors in said city and county have been excluded from such lists of trial jurors, from which said panels were drawn and summoned, and have been placed upon a list of special jurors for the trial of criminal causes, pursuant to said act, and have been improperly and illegally exempted from service upon general and ordinary duty as trial jurors under the provisions of said act, to the injury of defendant's substantial rights."

When the twelfth juror was called the defendant had exhausted the peremptory challenges to which he was entitled. After unsuccessfully challenging this juror upon various grounds, the defendant interposed the same challenge that he had previously offered to the panel. The exceptions taken to adverse rulings upon these challenges present the first question we are called upon to consider.

This precise question was before this court in *People v. Dunn* (157 N. Y. 528). In that case Judge GRAY very clearly disposes of the fallacy that mere regulations of the methods by which jurors are drawn are invasions of constitutional rights. It is true that in the *Dunn* case the question was examined from the opposite point of view. But the principle underlying the whole question is the same. There the defendant complained because he was compelled to take his jury from those selected by the special commissioner of jurors, instead of being permitted to select them from the general panel. Here the defendant objects because he is driven to a choice from the general panel after the special commissioner of jurors has taken therefrom twenty-five hundred men of presumably superior intelligence. In either event the result is the same so long as it does not infringe upon the right of a party to such a trial by jury as the Constitution guarantees. And what does the constitution guarantee? Simply the right to a trial by a common-law jury of twelve men. (*Wynehamer v. People*, 13 N. Y. 378-458.) Such a jury is none the less a common-law jury because the legislature happens to have provided for the particular mode of selection. This has always been regarded as a mere legislative regulation. The whole matter may be summarized in the simple inquiry whether the defendant had such a jury as he would have been entitled to if no special jury law had ever been enacted. The answer is obvious, and in view of the elaborate discussion of this question in the *Dunn* case, we deem it unnecessary to pursue it further.

Upon the trial evidence was given of confessions alleged to have been made by the defendant to the witnesses Dengler,

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Herlihy and others. This evidence was objected to on the grounds that such confessions, if made, were not voluntary, but were made under duress, and under the influence of fear produced by threats, while the defendant was in actual custody and after he had been subjected to brutality at the hands of the police. To this objection the court interposed the suggestion that there was no evidence that the defendant had been subjected to brutality at the hands of the police; or that the defendant's statements had been made under fear produced by threats, or were not voluntary. The court thereupon overruled defendant's objection, but gave him the opportunity to cross-examine the witnesses as to the circumstances under which defendant made the alleged confessions. Defendant's counsel thereupon examined the witnesses by whose testimony the prosecution offered to prove said confessions. At the conclusion of these preliminary cross-examinations the witnesses were permitted to testify to the statements made by the defendant concerning the homicide. To this defendant objected on the ground that it appeared that such statements were not voluntarily made, but were made under the influence of fear produced by threats. The court ruled that the evidence elicited on defendant's preliminary cross-examinations was not sufficient to present a question as to whether said confessions were voluntarily made or not, and overruled defendant's objections. The same question arose at different stages of the trial, both upon the exceptions taken to the admission of this kind of evidence and to the refusal of the court to charge that the question whether said confessions were voluntary or otherwise, was for the jury.

This feature of the case cannot be intelligently criticised without a recital of the evidence out of which it arises. It appears that immediately after the defendant's arrest he was taken to a police station on Fifth street. The uncontradicted testimony is to the effect that when the defendant arrived there he exhibited no marks of violence or rough treatment. After a short stay at the station house the defendant was taken back to the church to be identified by Smith. As he

was brought out of the church to be returned to the police station he was, according to the testimony of Police Officer Ryan, beset by citizens who had gathered on the street and beaten with sticks and canes. When he reached the station the second time he was bruised and bleeding about the head and was cared for by the ambulance surgeon who was in attendance. This testimony coincides with that of the other witnesses who saw the defendant at the station house on that night. In the forenoon of the same day the defendant was taken before a police magistrate, who after some conversation with Police Captain Herlihy in the presence of the defendant, remanded the latter to await the action of the coroner. There is some confusion in the evidence as to the time when the defendant was taken before the coroner. Captain Herlihy stated that it was on that same day. The witness Dengler thought it was on the next day. Captain Herlihy testified that when the defendant was brought back to the station house the second time he interrogated him as follows: "I asked him his name; he said it was Fritz Meyer; his age 45; born in Germany; occupation a laborer, and no home. I asked him then what he was doing in that church; he said he went in there for the purpose of robbing it. I asked him how he entered it; he said he went in when services were going on about 7 p. m.; I asked him what he done then; after services were over he hid himself in the church. I asked him what for, and he said for the purpose of robbing it; I asked him then why he shot the police officer; he stated, 'I shot him because I did not want him to take me;' that was his exact language; I says, 'How many shots did you fire at the police officer?' He stated two; showing him a revolver which had been taken from him, and asking him if it was his revolver; he stated 'yes.' I asked him if that was the revolver he shot the police officer with; he stated yes; showed him this instrument which had been taken from him and asked him if it was his property; he stated yes; I asked him what he used that for; he stated for breaking and opening doors."

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The witness Dengler testified that while waiting with the defendant and others, in the ante-room to the coroner's office, the defendant was asked, "Do you know this man?" meaning me, says he "no;" says I, "Haven't you seen me the night that you were in the church?" "No;" says I, "How did you get into that church and when?" says he, "During services about seven o'clock in the evening;" said I, "Where did you go?" Says he, "I sat in the last row of benches, and when I got a chance I went up in the gallery and hid myself; when the clock of the Third street church struck a quarter to twelve I went down;" and he said he had went to that poor box, the one nearest to Avenue A—the one found broken open—then says I: "When did you first know that you were discovered?" Says he, "I heard the iron bolts between the rectory and the church; I heard them pulled back and voices;" and he says it was then and there that he ran back into that room—into the schoolhouse; he unbolted one door; he ran down on the Avenue A aisle, he told me, and opened that door between the church and the schoolhouse; there is a door there that leads from the church right by the end of the altar; the door is facing the altar on the east side—on the northeast corner of the church facing the altar; the door is facing the altar on the east side; he says he went through that alleyway and then into the schoolroom, and thought he could hide himself in there; he said he heard somebody coming in through the alleyway into the schoolhouse; he told me that he went to the end of the schoolroom, and told me that he went down both stairways there—one leading to the Fourth street entrance and the other, as I have since been told, to the boiler room; he said he went down both stairways and found that he could not get out, and he said, "As I came up the stairway the officer stood at the head of the stairway," and he said the officer asked him what he was doing there, and he said "with that I shot him;" so then I asked him, says I, "I was looking through all the confession boxes on the side of the church;" I said, "Had you been in one of them, as I opened the door, would you have shot me?" says he, "Yes;"

I asked him then how he got out through the church, and he told me he jumped through that window; the door that he went through — that he broke; the schoolhouse that led through on to Fourth street; when I asked him if he would have shot me he said, "I would have shot the first man that came in front of me to get away."

Police Sergeant Diamond was present when the defendant was interrogated by Captain Herlihy, and corroborates in detail the latter's testimony as to the statements made by the defendant.

George W. Arnold, a newspaper man connected with the *New York Journal*, testified to an interview with the defendant at the Tombs Prison a day or two after the homicide. His version of that interview is as follows: "I asked him why he shot Policeman Smith, and he said he simply took a chance — a chance that every man had to take in his life; that he would, under the same circumstances, take the same chance again; that it offered him one opportunity, with the chance of all the kind of things that that implied, and he took it."

Robert Wilkes, another newspaper reporter, testified to an interview with the defendant at the Tombs on the day when the indictment was found against the defendant. The witness stated to the defendant that there was a "chance of him beating the game." The defendant replied: "What is the use; I have killed a man, and the police have got me, and that is all there is to it; no power on earth can save me."

It will be observed that the evidence of the foregoing statements, alleged to have been made by the defendant, was most cogent, and if regarded as trustworthy and credible, and considered in connection with the other evidence in the case, was absolutely conclusive, not only as to defendant's guilt, but as to the degree of the crime which he had committed.

It becomes our duty, therefore, to determine if there was error in the reception of this evidence; or, if it was properly received, whether the trial court erred in assuming to decide as matter of law that the confessions attributed to the defendant were voluntarily and freely made by him. As to the first

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branch of this inquiry there can be no doubt. Section 395 of the Code of Criminal Procedure is an explicit statutory declaration of the rule which has been adhered to by this court ever since the decision in *Hendrickson v. People* (10 N. Y. 13). The following cases are examples of the application of this rule: *People v. Wentz* (37 N. Y. 303); *Teuchout v. People* (41 N. Y. 7); *Murphy v. People* (63 N. Y. 590); *Cox v. People* (80 N. Y. 500); *People v. McGloin* (91 N. Y. 241); *People v. Chapleau* (121 N. Y. 266); *People v. Wright* (136 N. Y. 625); *People v. Cassidy* (133 N. Y. 612), and *People v. Kennedy* (159 N. Y. 357).

The rule which makes the confessions of a defendant competent evidence against him is, however, guarded by several limitations which materially affect the competency and the scope of such evidence. The confessions sought to be proved must not have been "made under the influence of fear produced by threats," nor pursuant to a stipulation of the district attorney that the person making them "shall not be prosecuted therefor." Neither shall any such confession be sufficient to warrant a conviction without additional proof that the crime charged has been committed. (Sec. 395, Code Crim. Pro.) That portion of the section which affects the competency of such evidence imposes upon the trial court the duty of deciding when it is admissible. It would not be difficult to imagine a case in which the inadmissibility of such evidence would be so palpable as to preclude doubt or discussion. What, then, is the duty of the court in a case where there is absolutely no doubt as to the admissibility of such evidence? Must that be submitted to a jury as a question of fact, which is plainly a naked question of law? We think not? The right and duty of the court to exclude such evidence when it is the product of fear, duress or threats, presupposes the same right and duty to admit such evidence when it as clearly appears that it was purely voluntary and entirely free from the vices which furnish the ground for exclusion.

We do not decide that the competency of such testimony always presents a question of law for the decision of the court;

on the contrary, it may be, and frequently is, a question of fact to be decided by the jury under proper instructions of the court. *People v. Cassidy* (133 N. Y. 612) was such a case.

The question then arises whether this is a case in which it was proper for the court to decide, as matter of law, that the confessions made by the defendant were voluntarily given. There is nothing in the evidence, except the defendant's arrest, and the fact that he was subjected to some physical violence at the hands of bystanders when he was being conveyed to the police station, that would furnish even a pretext for the claim that defendant's confessions were not voluntarily made. The language of the statute is that such confessions "can be given in evidence * * * unless made under the influence of fear produced by threats." There is not a suggestion of fear or threat even as to the confession alleged to have been made by defendant to Captain Herlihy within an hour of the arrest. But whatever view may be taken of this particular confession, it is clear to a demonstration that the statements made by the defendant to Dengler, to Arnold and to Wilkes were purely voluntary. The statement to Dengler was made on the day after the homicide in the ante-room of the coroner's office. Dengler was not an officer of the law, and was not even known to the defendant until the latter was told of the former's participation in the search of the church premises after the alarm had been given. This statement bears intrinsic evidence of having been voluntarily made. There was no occasion for making it at all, except the volition of the defendant. The same thing is true of the statements made to the reporters Arnold and Wilkes. The defendant was in custody, but that of itself does not raise a question as to the competency of his statements as evidence against him. The court instructed the jury that they were not concluded by these confessions, and that the credibility of the witnesses who testified to them must be passed upon by the jury. After a most diligent and careful study of the record, so far as it relates to the question now under discussion, we

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are of the opinion that the trial court committed no error in deciding as a matter of law that the confessions of the defendant were voluntarily made. This decision is made, however, purely upon the facts of this case, and is not designed to formulate a rule for the guidance of trial courts in other cases. It is, manifestly, the better rule to resolve in favor of a defendant all doubts as to the character of confessions attributed to him by the submission to the jury of all disputed questions relating to the competency of such statements.

There is, however, another aspect of this case which, of itself, would justify the affirmance of the judgment herein. There was ample evidence, outside of defendant's confessions, to sustain the verdict of the jury. These confessions, if accepted as true, of course removed all doubt as to the motive and purpose which actuated the defendant in the firing of the shots that caused Smith's death. They were offered for the sole purpose of proving the existence of deliberation and premeditation as essential ingredients of the crime of murder in the first degree as defined in one portion of section 183, Penal Code.

Here, however, there was abundant evidence, both direct and circumstantial, outside of defendant's confessions, to prove his guilt of the crime of murder in the first degree, under that provision of the statute which declares that the killing of a human being is murder in the first degree when done "without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise." (Sec. 183, Penal Code.)

Burglary in the third degree is a felony. That part of section 498 of the Penal Code which is applicable to this case defines burglary in the third degree as follows: "A person who * * * being in any building, commits a crime therein and breaks out of the same, is guilty of burglary in the third degree." The evidence was ample to warrant the conclusion that the defendant was in this church for the purpose of committing larceny. Larceny of any degree is a crime, and the

attempt to commit larceny in any degree is a crime. (Sections 528 and 34, Penal Code.) The evidence establishes beyond a reasonable doubt that the defendant fired the shots which caused the death of Smith; and conclusively that death resulted from the wound inflicted by such shots. The evidence is equally incontrovertible and uncontroverted that the defendant did "break out" of the building in which he had committed a crime. Thus all the constituent elements of the crime of one kind of murder in the first degree were proven, and under these circumstances the judgment of the court below would be upheld even though it were assumed that a technical error had been committed in withholding from the consideration of the jury the question whether defendant's confessions were voluntary or not. Under the circumstances of this case, the rulings of the court upon these confessions were not material, and did not prejudice the defendant's substantial rights. It is the duty of this court, therefore, in the promotion of justice, to disregard the same. (Sec. 542, Code Crim. Pro.)

But the appellant insists that the indictment was insufficient in form to give competency to the evidence of the commission of a felony as an incident to the killing. This question was set at rest in *People v. Giblin* (115 N. Y. 196) where it was held that a common-law indictment "stating the facts constituting the crime and charging the killing to have been done willfully, feloniously and with malice aforethought, is sufficient to sustain a conviction of murder in the first degree, if the proof as to the manner of the commission of the crime brings it within one of the statutory definitions."

In that case, as in this, the indictment was in the old common-law form, and the proof showed that the defendant had done the killing while in the commission of a felony, which brought the crime within one of the statutory definitions of murder in the first degree. There are other exceptions in the case which we have not discussed, not alone because we do not deem them worthy of consideration, but because appellant's counsel has suggested that the court limit its discussion to the exceptions above referred to.

We may, therefore, conclude the performance of our solemn duty in this case by stating that we find no error in the rulings and decisions of the trial court, which require or permit a reversal of its judgment, and said judgment should, therefore, be affirmed.

PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT and CULLEN, JJ., concur; LANDON, J., concurs in result.

Judgment of conviction affirmed.

FERRIS J. MEIGS, Respondent, v. JAMES A. ROBERTS, as
Comptroller of the State of New York, Appellant.

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1. JURISDICTIONAL DEFECTS CURED BY STATUTE OF LIMITATIONS. The principle that jurisdictional defects are so vital in their character as to be beyond the help of retrospective legislation does not apply to a statute of limitations, for such a statute will bar any right, however high the source from which it may be deduced, provided that a reasonable time is given a party to enforce his right.

2. STATE TAX SALE — L. 1885, CH. 448, PRIMARILY A STATUTE OF LIMITATION. Chapter 448 of the Laws of 1885, amending Laws of 1855, chapter 427, section 65 (subsequently re-enacted in part in L. 1891, ch. 217; L. 1893, ch. 711), which makes the comptroller's conveyance executed upon a tax sale conclusive evidence, after the lapse of two years from its record in the county in which the lands conveyed are located, of the regularity of the proceedings in which conveyance was made although in some aspects a curative statute, is, primarily and essentially, a statute of limitations.

3. EJECTMENT AGAINST STATE COMPTROLLER — ACTION BARRED BY STATUTORY NOTICE AFTER TWO YEARS. Where, after the default of the purchaser, at a state tax sale in 1881, of part of a tract of wild, vacant and forest lands in Franklin county, and after the publication of the statutory notice of redemption, the comptroller conveys the whole tract to the state under the statute (L. 1881, ch. 402) by a deed recorded in that county in 1887, and in 1894 duly publishes the statutory notice (L. 1893, ch. 711, § 13) that the lands are thereby declared to be and thereafter shall be deemed to be in his actual possession for the state, the previous owner of the fee of the whole tract, failing to prove any actual possession in himself or his grantors, cannot, in 1897, maintain an action for ejectment against the comptroller, although the notice of redemption published by the comptroller stated that only part of the tract was unredeemed, as such action is barred by the lapse of more than two years since the publi-

cation of the statutory notice (L. 1885, ch. 448, as re-enacted L. 1893, ch. 711); and by the statute (L. 1885, ch. 288) the People of the state acquired not only constructive, but actual, possession of the lands conveyed by the comptroller's deed.

Meigs v. Roberts, 42 App. Div. 290, reversed.

(Argued February 8, 1900; decided March 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department entered July 17, 1899, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term, and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Theodore E. Hancock for appellant. The comptroller is not in such possession of the lands in question that the title of the state to these premises can be tested, impaired or questioned in an action of ejectment against said comptroller. (L. 1895, ch. 395, § 270; L. 1885, ch. 283, § 7; *Ensign v. Barse*, 107 N. Y. 339; *People v. Turner*, 145 N. Y. 456; *Ostrander v. Darling*, 127 N. Y. 70; *People ex rel. v. Campbell*, 22 App. Div. 170; *People ex rel. v. Roberts*, 8 App. Div. 219; 151 N. Y. 540; *Locke v. State*, 140 N. Y. 480; *People v. Denison*, 84 N. Y. 272; *Splittorf v. State*, 108 N. Y. 205; *Peck v. State*, 137 N. Y. 372; *Carr v. U. S.*, 98 U. S. 433.) The comptroller's deed to Turner & Marsh did not convey the title which the state had acquired at the 1881 and 1885 tax sales. (L. 1855, ch. 427; L. 1881, ch. 402; L. 1860, ch. 209.) The Forest Preserve Act (Ch. 283, L. 1885) is a special act, relating to the forest commission and the forest preserve. The object of this act, as well as the one establishing the fisheries, game and forest commission, was to place the forest commission in the actual possession and control of the forest preserve as the representatives of the state. The general statutory provision contained in chapter 453 of the Laws of 1885 (§ 93), and chapter 711, Laws of 1893 (§ 13), permitting the comptroller to advertise himself in possession of wild, vacant and forest lands, must be held not to apply to lands of

the state contained in the forest preserve. (*People v. Turner*, 145 N. Y. 461; *People ex rel. v. Campbell*, 152 N. Y. 51; *N. Y., L. E. & W. R. R. Co. v. Bd. of Suprs.*, 67 How. Pr. 5; *Matter of Comrs. of Central Park*, 50 N. Y. 493; *People ex rel. v. Palmer*, 52 N. Y. 83; *People v. Quigg*, 59 N. Y. 83; *Matter of D. & H. C. Co.*, 69 N. Y. 209; *Coxe v. State*, 144 N. Y. 411; *Woods v. Bd. of Suprs.*, 136 N. Y. 403; *People ex rel. v. N. Y. C. Protectory*, 101 N. Y. 201.) This action was not commenced within the time required by chapter 448 of the Laws of 1885, which statute has been declared valid as a curative act and as a statute of limitations. (*People v. Turner*, 145 N. Y. 451; *Turner v. State of N. Y.*, 168 U. S. 90; *Terry v. Anderson*, 95 U. S. 628; *Matter of Brown*, 135 U. S. 701; *Sprecker v. Wakely*, 11 Wis. 432; *Geekie v. K. C. Co.*, 106 U. S. 379, 384; *Townsend v. Wilson*, 9 Penn. St. 270; *Bronson v. S. C. L. Co.*, 44 Minn. 251; *Williams v. Bd. of Suprs.*, 122 U. S. 163; *Coulter v. Stafford*, 48 Fed. Rep. 266.) The 1881 tax sale was regular, and the notice to redeem and publication thereof was in strict compliance with the statute. (*People v. Turner*, 117 N. Y. 238; *Chamberlain v. Taylor*, 36 Hun, 43; *People v. Turner*, 145 N. Y. 460; *Bank of Chillicothe v. Dodge*, 8 Barb. 237; *Robertson v. O. E. Co.*, 82 Hun, 585; *Merchants' Bank v. Spalding*, 12 Barb. 302; *Hamilton v. People*, 57 Barb. 633; *Hagner v. Hall*, 10 App. Div. 583; *Ensign v. Barse*, 107 N. Y. 338; *Williams v. Bd. of Suprs.*, 122 U. S. 163.) The 1885 tax sale was regular and conveyed to the state a valid title to the land described in the complaint. (*Andrews v. Wheeler*, 22 App. Div. 596; *Colman v. Shattuck*, 62 N. Y. 358; *Chamberlain v. Taylor*, 36 Hun, 25; *People v. Turner*, 117 N. Y. 227; 145 N. Y. 451; *Ensign v. Barse*, 107 N. Y. 338; *Ostrander v. Darling*, 127 N. Y. 70; *People ex rel. v. Roberts*, 8 App. Div. 219; *People ex rel. v. Roberts*, 151 N. Y. 540; *People ex rel. v. Chapin*, 104 N. Y. 369.) The plaintiff has attempted to secure title to the premises in question at a time when they were held adversely to his grantors. The conveyance to Meigs was void. (Code Civ. Pro. § 1501;

People ex rel. v. Roberts, 151 N. Y. 541; *People v. Turner*, 145 N. Y. 461; *People ex rel. v. Campbell*, 152 N. Y. 58; *Quindairo Township v. Squier*, 51 Fed. Rep. 152; *Chamberlain v. Taylor*, 26 Hun, 603; 92 N. Y. 348; *Sands v. Hughes*, 53 N. Y. 287; *Webb v. Bindon*, 21 Wend. 98; *Jackson v. Andrews*, 7 Wend. 152; *Christie v. Gage*, 71 N. Y. 189; *Orary v. Goodman*, 22 N. Y. 170; *Pearce v. Moore*, 114 N. Y. 259.)

John P. Badger for respondent. The finding of the trial court that the lands in controversy are within the forest preserve, and that the commissioners of fisheries, game and forests have the care, custody, control and superintendence of the same is erroneous. (L. 1885, ch. 283, § 7; L. 1855, ch. 427, § 61.) Upon the publication of the notice of redemption by the comptroller, the owner of the land had a right to rely upon the official statement contained in it that only 100 acres of his land had been sold; that by that sale the taxes on the entire premises had been paid. (L. 1855, ch. 427, § 50; 2 R. S. 1137.) The attempted transfer to the state was void for the reason that the notice of redemption, as published, gave the owner of the land official notice and assurance that only 100 acres had been sold; that the taxes had been thereby paid; that if the owner did not redeem, that quantity and inferentially no more, would be conveyed to the purchaser, and by a further inference that the rest of his land was free and would not be conveyed to the state under the statute authorizing such conveyance under proper circumstances. (*Van Benthuyssen v. Sawyer*, 36 N. Y. 150; *People ex rel. v. Registrar*, 114 N. Y. 21; *Breisch v. Coxe*, 81 Penn. St. 336; *Forrest v. Henry*, 33 Minn. 434; *Martin v. Barbour*, 34 Fed. Rep. 701.) As the comptroller never published any notice of redemption of the lands transferred to the state, such omission would have rendered the transfer to the state void even if it had been otherwise valid. (*Stuart v. Palmer*, 74 N. Y. 183; *Simonton v. Hays*, 32 Hun, 287; 101 N. Y. 687; *Becker v.*

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Holdridge, 47 How. Pr. 430; *Meigs v. Roberts*, 42 App. Div. 296; *Bunner v. Eastman*, 50 Barb. 639; *Overing v. Foote*, 65 N. Y. 277; *People ex rel. v. Mosier*, 56 Hun, 66.) Neither the act of 1885, nor of 1893, could or did cure the defects in or validate the transfer to the state of the lands in question in 1884, as those defects were of such character as to make them in the highest degree jurisdictional. (*Turner v. Boyce*, 11 Misc. Rep. 506; *Cromwell v. MacLean*, 123 N. Y. 489; *Joslyn v. Rockwell*, 128 N. Y. 334; *Ensign v. Barse*, 107 N. Y. 338; *Meigs v. Roberts*, 42 App. Div. 298.) As a transfer to the state at a tax sale of lands previously owned and held by it is only authorized or permissible where the state does in fact own it, the subsequent so-called sale is an absolute nullity. (*Turner v. Boyce*, 11 Misc. Rep. 512; *Cromwell v. MacLean*, 123 N. Y. 474.)

CULLEN, J. This action is in ejectment for a tract of wild land in Franklin county containing 585½ acres, and was commenced on April 2nd, 1897. The complaint alleged that the plaintiff was the owner in fee and entitled to the immediate possession of the lands; that since the 1st of January, 1895, the defendant had been and then was comptroller of the state of New York, and that as such comptroller he was and had been for two years in possession of the said lands. The defendant answered admitting that he was comptroller of the state during the period stated, and put in issue every other allegation of the complaint. The answer then set up that the People of the state were, and for more than ten years past had been, in the actual possession of the premises under a certificate of sale made by the comptroller to the People of the state of New York on the 23d day of November, 1881, in pursuance of a sale held for non-payment of taxes, and a conveyance made on the 31st day of October, 1884, under such tax sale after the expiration of the two years allowed by law for redemption, which conveyance was recorded in the office of the clerk of the county of Franklin on April 6th, 1887. The answer further set forth as a separate defense a similar certifi-

cate, executed on the 29th day of November, 1885, on a sale for unpaid taxes, a conveyance thereunder dated on the 15th day of February, 1890, and the record of the conveyance in the clerk's office of Franklin county on the 3d day of March, 1891. The defendant further pleaded that under the provisions of chapter 448 of the Laws of 1885, chapter 217, Laws of 1891, and chapter 711 of the Laws of 1893, the action was not brought within the time prescribed by law, and was barred by the Statute of Limitations.

On the trial the plaintiff traced his title by a chain of conveyances from an original grant by the state in 1798. The evidence shows that beginning December 22d, 1894, the defendant published for three weeks a notice stating that the premises in controversy, with others, were wild, vacant and forest lands, located in Franklin county to which the state held title, and that from and after the expiration of the publication possession thereof would be deemed to be in the control of the state, under provision of section 13, chapter 711 of the Laws of 1893. The tax certificates and conveyances were put in evidence. The only attack on the conveyance of 1884 made in pursuance of the tax sale held in 1881, related to the notice of redemption published by the comptroller. It appears that on the sale one Josiah Talmage purchased one hundred acres of the tract for the full amount of the unpaid taxes, and that a certificate of sale was issued to him. Talmage never paid the purchase money or completed his purchase. While Talmage was thus in default the comptroller published a notice of unredeemed lands in which it was stated as to these premises that one hundred acres were unredeemed. After the publication of the notice to redeem, the comptroller, on account of Talmage's failure to pay the purchase price, conveyed the whole tract of 585½ acres to the state, as required by chapter 402 of the Laws of 1881. It is unnecessary to refer to the grounds on which the conveyance of 1890 was assailed. No proof was given of any possession or occupation of the premises by the plaintiff or his predecessors in title. The trial court dismissed the complaint substantially on the ground that the premises were part of the forest pre-

serve, and in the occupation of the state ; that an action against the state to test its title could not be maintained except by consent of the state, and that the statute of 1893 (Chapter 711, § 13) was not sufficient to authorize the maintenance of such an action. The learned Appellate Division, by a divided court, reversed the judgment and granted a new trial, holding that the act of 1893 authorized the plaintiff to sue the state and oust it from possession by an action against the comptroller. It further held that the notice of redemption on the tax sale of 1881 was fatally defective, in that it stated that one hundred acres only of the premises in suit were unredeemed while the conveyance was of the whole tract ; that for this defect the conveyance made in pursuance of the sale in 1884 did not pass title and that its invalidity was not cured by the provisions of chapter 148, Laws of 1885 (subsequently re-enacted in part, chap. 217, Laws of 1891 ; chap. 711, Laws of 1893), which makes a conveyance of the comptroller upon tax sales, after the lapse of two years from its record in the county in which the lands are situated, conclusive evidence of the regularity of the proceedings in which conveyance was made.

We do not find it necessary to pass upon many of the questions which have been elaborately argued before us, or even the one upon which the decision of the trial court proceeded. We are of opinion that the lapse of time between the record of the conveyance of 1884 and the commencement of this action barred the right to the plaintiff to maintain it, even assuming the other questions in the case should be resolved in his favor. The learned Appellate Division held that the failure to publish a proper redemption notice was jurisdictional as to the conveyance of 1884, and, hence, not cured by chapter 448 of the Laws of 1885, and cited *Ensign v. Barse* (107 N. Y. 329) and *Joslyn v. Rockwell* (128 N. Y. 334) as authorities for that proposition. We think the learned court took too narrow a view of the statute of 1885. This statute, though in some aspects a curative law, is primarily and essentially much more ; it is a statute of limitation. It was dis-

tinctly held to be such in two decisions of this court (*People v. Turner*, 117 N. Y. 227; *Same v. Same*, 145 N. Y. 459), and by the Supreme Court of the United States. (*Turner v. New York*, 168 U. S. 90.) A curative act in the ordinary sense of that term is a retrospective law acting on past cases and existing rights. The power of the legislature to enact such laws is, therefore, confined within comparatively narrow limits, and they are usually passed to validate irregularities in legal proceedings or to give effect to contracts between parties which might otherwise fall for failure to comply with technical legal requirements. (Cooley's Constitutional Limitations, p. 454.) A very full enumeration of the cases in which the legislature may properly exercise this power is to be found in *Forster v. Forster* (129 Mass. 559). But there may be in legal proceedings defects which are not mere informalities or irregularities, but so vital in their character as to be beyond the help of retrospective legislation; such defects are called jurisdictional. This principle does not apply to a Statute of Limitations, for such a statute will bar any right, however high the source from which it may be deduced, provided that a reasonable time is given a party to enforce his right (*Terry v. Anderson*, 95 U. S. 628; *Turner v. New York*, *supra*.) *Ensign v. Barse* (*supra*) was strictly a case of a retrospective statute, for no period of time was given within which any party affected could assert his rights. The same is true of *Cromwell v. MacLean* (123 N. Y. 474). In *Joslyn v. Rockwell* (*supra*), as well as in the two cases of *People v. Turner*, all of which arose under the statute of 1885, there is to be found a discussion of defects which it was claimed were jurisdictional and not cured by that act. Such discussion, however, is not to be construed as authority for the proposition that jurisdictional defects in legal proceedings, which are beyond the scope of retrospective legislation, will equally take a claim out of the bar of a Statute of Limitations. The existence of such defects was necessarily considered in the authorities cited because the statute of 1885, in terms, exempted from its operation cases where the taxes had

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been paid, or where there was no legal right to assess the land on which they were laid. There is no exception, however, as to defects in notices of redemption or in their publication; on the contrary, it is expressly provided that the comptroller's deed, after the lapse of the requisite time, shall be conclusive evidence that "all notices required by law to be given previous to the expiration of the two years allowed by law to redeem were regular, and regularly given."

The comptroller's deed of 1881 was recorded on the 6th day of April, 1887, while this action was not brought till nearly ten years thereafter. If it be claimed that the statutory limitation of two years did not run during some portion of this period because there were no persons or officers against whom the plaintiff could maintain an action in assertion of his title (a contention which seems to be in direct opposition to the decisions in the case of *People v. Turner*), certainly the disability ceased at the expiration of the publication of the comptroller's notice declaring that the state had resumed possession of the lands; for the very foundation of the plaintiff's whole case is the proposition that the statute under which that notice was published authorizes him to bring this suit. The most that could result from the plaintiff's contention, if good, would be that the statutory limit of two years would not commence to run until the publication of the comptroller's notice. But more than two years elapsed between that notice and the commencement of this action.

It is questionable whether as to an owner in actual possession of land the record of a hostile conveyance in the clerk's office is sufficient to set a Statute of Limitations running against him so as to destroy his title. (See remarks, PECKHAM, J., in *Joslyn v. Rockwell*, *supra*; also Cooley's Constitutional Limitations, p. 366.) The decisions on the subject are in conflict. In *Groesbeck v. Seeley* (13 Mich. 29) and in *Case v. Dean* (16 Mich. 12) it was held that even as to an owner in constructive possession only, a limitation law could not compel him to resort to legal proceedings in defense of his title. A contrary view was taken in *Hill v. Kricke* (11

Wisconsin, 442) and in *Leffingwell v. Warren* (2 Black [U. S.], 599).

In the case before us, as already stated, the plaintiff has not proved any actual possession in himself or in his grantors. If he relies on constructive possession as following the legal title, then such possession ceased with the publication of the comptroller's notice of possession by the state. Here, again, the plaintiff must face the original proposition on which his action is based, that by virtue of the notice the comptroller was placed in either actual or constructive possession. We are, therefore, of opinion that in any view of the case the plaintiff's right to maintain this action was barred after the expiration of two years from the time of the comptroller's notice. Of this last claim there is further to be said, that, in the second *Turner Case* (145 N. Y. 451), this court held, through GRAY, J., that by chapter 283, Laws of 1885, the People of the state acquired not only constructive, but actual, possession of the lands conveyed to them by the comptroller's deed.

We think the answer of the defendant (for all the facts are pleaded) was sufficient, not only to raise the six months' limitation prescribed by the act of 1885, but also the limitation we have discussed.

The judgment of the Appellate Division should be reversed and the judgment entered on the decision of the trial court affirmed, with costs.

PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT and WERNER, JJ., concur; LANDON, J., not sitting.

Judgment reversed, etc.

IMOGENE MAUD LOUDOUN, Respondent, v. THE EIGHTH AVENUE RAILROAD COMPANY and THE THIRD AVENUE RAILROAD COMPANY, Appellants.

1. NEGLIGENCE — QUESTION OF FACT. Where, in an action to recover damages for injuries sustained by a passenger in an open horse car which was struck at its rear by a cable car of another independent street railway whose line crossed the horse car line at right angles, there is no evidence of the relative position or speed of the cars as they approached the intersection, the

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negligence of both street railway corporations is a question for the jury; and a charge of the trial court that the accident raised a presumption of negligence, and that there was no testimony to overcome the presumption, is an error which is not cured by repeated instructions of the court that the burden of proof is on the plaintiff to establish each element of her case, including the negligence of both defendants.

2. *RES IPSA LOQUITUR* — DOCTRINE APPLIES TO CARRYING, BUT NOT TO COLLIDING, COMPANY. The fact of the accident raises a presumption, under the doctrine of *res ipsa loquitur*, that the carrier of the passenger was negligent, for it was bound to exercise a very high degree of care, especially at an intersection with another road, but no such presumption arises against the other street railway, as it, not being the carrier, was bound to exercise only ordinary care under such circumstances.

3. *ERRONEOUS CHARGE THAT ACCIDENT WAS UNEXPLAINED*. It is erroneous for the trial court to charge as matter of law that no explanation of the accident, required of the carrier under the circumstances, had been given where the proof is that the cable car struck the horse car at its rear end, as how far that fact tended to show that the horse car had properly and carefully proceeded over the crossing and that the collision was not its fault, but was the fault of the other street railway, is a question of fact for the jury.

Loudoun v. Eighth Ave. R. R. Co., 16 App. Div. 152, reversed.

(Argued February 9, 1900; decided March 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 23, 1897, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

John Hardy for the Eighth Avenue Railroad Company, appellant. The court erred in denying the motion which was made to dismiss the complaint as against the Eighth Avenue Railroad Company when the plaintiff rested. (Whittaker's Smith on Negligence, § 421; *Wright v. M. Ry. Co.*, L. R. [8 Exch.] 137; *Daniel v. M. R. Co.*, L. R. [3 C. P.] 216; *Holbrook v. U. & S. R. R. Co.*, 12 N. Y. 236; *Curtis v. R. & S. R. R. Co.*, 18 N. Y. 535; *Breen v. N. Y. C. & H. R. R. R. Co.*, 109 N. Y. 300; *Quinlan v. S. A. R. R. Co.*, 4 Daly, 488; *P. C. & S. L. R. R. Co. v. Spencer*, 98 Ind. 186;

Smith v. S. P. C. Ry. Co., 50 Am. Rep. 551; *Potts v. C. C. Ry. Co.*, 33 Fed. Rep. 611.) The court erred in refusing to charge as requested that no inference of negligence against the Eighth Avenue Railroad Company must be drawn simply because of the occurrence of the accident, and defendant's exception was well taken. (*Babcock v. F. R. R. Co.*, 140 N. Y. 308, 311; *Morris v. L. S. & M. S. R. Co.*, 148 N. Y. 182; *Hart v. H. R. B. Co.*, 84 N. Y. 56.)

Herbert R. Limburger and *Henry L. Scheuerman* for the Third Avenue Railroad Company, appellant. The court erred in charging that the mere fact of the collision raised a presumption that the defendant the Third Avenue Railroad Company was guilty of negligence. (*Falke v. T. A. R. R. Co.*, 38 App. Div. 49.) The mere happening or occurrence of an accident does not raise a presumption of negligence, but proof must be offered to show that defendant omitted to perform some duty. (*Holbrook v. U. S. R. R. Co.*, 12 N. Y. 236; *Dobbins v. Brown*, 119 N. Y. 188; *Cosulich v. S. O. Co.*, 122 N. Y. 118; *De Vau v. P. & N. Y. C. & R. R. Co.*, 130 N. Y. 632; *Kirby v. D. & H. C. Co.*, 20 App. Div. 473; *Kay v. M. S. Ry. Co.*, 29 App. Div. 466; *Kearney v. L. etc., R. R. Co.*, L. R. [5 Q. B.] 411; *Curtis v. R. & S. R. R. Co.*, 18 N. Y. 534; *Edgerton v. N. Y. & H. R. R. Co.*, 39 N. Y. 227; *Mullen v. St. John*, 57 N. Y. 567, 571.) The court erred in charging the jury that the defendant Third Avenue Railroad Company is liable, providing the collision can be attributed to the want of care. (*Reardon v. T. A. R. R. Co.*, 24 App. Div. 163; *Leonard v. Collins*, 70 N. Y. 90.) The plaintiff failed to prove that the defendant Third Avenue Railroad Company was negligent. (*Baulec v. N. Y. & H. R. R. Co.*, 59 N. Y. 356, 366; *Hart v. H. R. B. Co.*, 84 N. Y. 56, 62; *Searles v. M. Ry. Co.*, 101 N. Y. 661, 662; *Unger v. F. S. S. & G. S. F. R. R. Co.*, 51 N. Y. 497; *Falotio v. B. & S. A. R. R. Co.*, 9 Daly, 243; *P. C. & S. L. R. R. Co. v. Spencer*, 98 Ind. 186; *Tompkins v. C. S. R. R. Co.*, 66 Cal. 183.)

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C. N. Bovee, Jr., and J. Baldwin Hands for respondent. The action was properly brought against both defendants. They are both liable to plaintiff for injuries. (*Colgrove v. N. Y. & N. H. R. R. Co.*, 20 N. Y. 492; *Barrett v. T. A. R. R. Co.*, 45 N. Y. 628; *Webster v. H. R. R. R. Co.*, 38 N. Y. 260.) The plaintiff had established a *prima facie* case of negligence against both defendants when she rested. The accident was such as in the ordinary course of business does not happen if reasonable care is used, and, in the absence of an explanation by defendants, affords sufficient evidence that the accident arose from the want of care by both defendants. (*Volkmer v. M. R. Co.*, 134 N. Y. 418; *Hogan v. M. R. Co.*, 149 N. Y. 23; *Alberti v. N. Y., L. E. & W. R. R. Co.* 43 Hun, 421; 118 N. Y. 77; *Seyboldt v. N. Y., L. E. & W. R. R. Co.*, 95 N. Y. 562; *Horowitz v. H. A. P. Co.*, 18 Misc. Rep. 24; *Breen v. N. Y. C. & H. R. R. R. Co.*, 109 N. Y. 298; *Kay v. M. S. R. Co.*, 29 App. Div. 466; *Met v. Kennedy*, 51 U. S. App. 503.)

CULLEN, J. This action was brought to recover damages for personal injuries alleged to have been received in a collision between the cars of the two defendants. The plaintiff and her husband were passengers in an open horse car on the Eighth Avenue railroad. The Third Avenue Railroad Company operated a cable road on One Hundred and Twenty-fifth street, which crosses Eighth avenue at right angles. At the time of the collision the plaintiff was sitting in the rear seat of the Eighth avenue car. That car, while passing over the intersection of the two roads, was struck by the cable car at the point where the plaintiff was sitting with such force as to throw the horse car from the track. The plaintiff was thrown down from her seat and, undoubtedly, was bruised, but whether she received the serious injuries to her nerves and health for which she was allowed compensation was a matter of controversy. The evidence as to the manner in which the collision occurred is extremely meagre, consisting only of the testimony of the plaintiff and her husband. Neither defend-

ant produced as witnesses the employees in charge of its car. Neither the plaintiff nor her husband noticed the approach of the cable car, and they were able to state only that while the car in which they were riding was passing over the crossing it was struck by the other car.

We agree with the learned court below that the details of the collision, meagre as they were, required submission to the jury of the issue of negligence as to each defendant, and that a nonsuit as to either would have been improper. It is true, as claimed by the Third Avenue Railroad Company, that the fact that the Eighth avenue railroad car was first on the crossing does not conclusively show that such car had the right of way. But, in the absence of any evidence showing the relative position or speed of the two cars as they approached the intersection, it did constitute evidence from which the jury might have inferred that the Eighth avenue car was entitled to precedence. The cogency of the evidence would also depend on the part of the horse car that was struck by the cable car. In the present case it appears that the horses and a great portion of the car itself had passed the crossing before the collision occurred. We do not say that, on this proof, the defendant the Third Avenue Railroad Company was negligent, as matter of law, but only that it was a question of fact for the jury.

We are of opinion, however, that the learned trial judge erred in his instructions to the jury, and that for such errors this judgment must be reversed. The court charged: "It is, therefore, a reasonable presumption, in the absence of any explanation, that the accident resulted from the want of ordinary care on the part of the defendants. When the plaintiff rested her case, therefore, the burden was upon the defendants of showing such facts as warrant the conclusion that the accident was due to circumstances which the exercise of ordinary care could not foresee and guard against. Now, no testimony is offered by the defendants to overcome this presumption. The driver of the Eighth avenue car was not called; it does not appear that he was where he could be called. There is no

explanation given, and, therefore, I am bound to say to you that there is no testimony to overcome the presumption of negligence which the circumstances have disclosed; there is no testimony on the part of the defendants to overcome the presumption created by the circumstances under which the collision took place." As we read this part of the charge the issue of the defendants' negligence was substantially taken away from the jury. It is true that the court repeatedly charged that the burden of proof rested on the plaintiff to establish each element of her case, including that of the negligence of the defendants. But, taken in connection with the portion of the charge quoted, that the accident raised a presumption of negligence, and that there was no testimony to overcome the presumption, the jury was substantially told the plaintiff had successfully borne that burden. Each defendant took an exception to that part of the charge which instructed the jury that the accident raised a presumption of negligence against it calling for an explanation, though neither seems to have excepted to the charge that no explanation had been given.

The appellant the Third Avenue Railroad Company insists that the doctrine *res ipsa loquitur* does not apply to it, and that the instruction that the occurrence of the collision raised a presumption of negligence upon its part calling for an explanation was erroneous. With this claim we agree. (*Falke v. Third Avenue Railroad Company*, 38 App. Div. 49.) That defendant, not being the carrier, was bound only to the exercise of ordinary care in the management of its cars. If one company had been in the control and management of both the cars a presumption of negligence on its part would properly arise. But here there were two actors, and the collision might have been due entirely to the fault of one party and not at all to the fault of the other. The decisions in *Volkmar v. Manhattan Railway Company* (134 N. Y. 418) and *Hogan v. Manhattan Railway Company* (149 N. Y. 23) do not apply to a case like this. In those cases pieces of iron fell from the elevated railway structure and injured the plaintiffs traveling

on the highway beneath. It was held that the occurrence of the accident raised a presumption of negligence. But articles should not be suffered to fall on the highway, and ordinarily do not fall without carelessness on the part of the persons letting them fall. In those cases the parties injured in no way contributed to the accident except by their presence. Here the railroad company had the right to operate its cars along the street, and it cannot be said that in the ordinary course of things a car does not collide with vehicles or persons except when there has been carelessness in the management of the car. Unfortunately, the reports are full of cases of such collisions and of serious injuries resulting therefrom where it has been found, either as matter of fact by juries or as matter of law by the courts, that the railroad company was not at fault. The exception of this appellant to the court's charge is well taken.

As to the appellant the Eighth Avenue Railroad Company a different rule obtains. While it was not a guarantor of the safety or security of its passengers, it was bound to exercise a very high degree of care to accomplish that result. It is easy to imagine many injuries that might occur to passengers from which no presumption of negligence would arise. But the danger of collision with other vehicles moving on the street is always present, and the employee managing and controlling the car must be on the alert to avoid that danger. The danger is greater at the intersection of other railroads, and care must there be used proportionate to the danger. As was said by the court below, the Eighth Avenue Railroad Company could not insist upon or assert its right of way at the crossing as against the car of the other company if there were reasonable grounds to apprehend that thereby it would endanger the safety of its passengers. The management and control of the transportation of the passenger is wholly confided to the employees operating the car, and the former cannot be expected to be on the watch either as to its management or that of other vehicles, or if a collision takes place, be able to account for its occurrence. Therefore, when

such a collision occurs there arises a presumption of negligence on the part of the carrier, which calls upon it for explanation. The exception of the Eighth Avenue Railroad Company to the instruction of the court on this subject is not well taken.

But though the occurrence of the accident called for an explanation by this defendant, we think the trial court erred in charging, as a matter of law, that no explanation had been furnished. We have already referred to the fact that the cable car struck the rear end of the horse car. How far this circumstance tended to show that the horse car had properly and carefully proceeded over the crossing and that the collision was due not to its fault but to that of the other defendant, was a question of fact for the jury, not of law for the court. What we have said before as to the bearing of this circumstance on the negligence of the Third Avenue Railroad Company is equally applicable to the absence of negligence on the part of the Eighth Avenue Company. On this evidence we think it should have been left to the jury to determine whether either or both of the companies were negligent. While an exception was not taken to the charge of the court, the question was raised when the court refused to charge the request: "If either the conclusion of the negligence of the Eighth Avenue Railroad Company or the absence of negligence on its part may, with equal fairness, be drawn, then the Eighth Avenue Railroad Company cannot be recovered against;" to which the defendant excepted. This refusal was consistent with the court's previous ruling that, as matter of law, the presumption of negligence had not been overcome. In our view, however, it was erroneous; for, even though the accident created a presumption of negligence on the part of the defendant the Eighth Avenue Railroad Company, still, if there was any evidence to rebut the presumption, the burden of proof rested on the plaintiff (*Whitlatch v. Fidelity & Casualty Company*, 149 N. Y. 45), and if on the whole case the conclusion of negligence, or absence of negligence, could be drawn with equal fairness that burden was not discharged. (*Cordell v. N. Y. C. & H. R. R. Co.*, 75 N. Y. 330.)

The court also erred in its charge that the defendant was liable in case the jury should find that "the collision can be attributed to the want of reasonable care on the part of the defendants." To this both defendants excepted. The question was not whether the collision could be attributed to their negligence, but whether, as matter of fact, it was attributable to their negligence. Still, the matter is not of great importance as the court practically had taken the issue of negligence away from the jury.

The judgment should be reversed and a new trial granted, costs to abide the event.

GRAY, O'BRIEN, HAIGHT, LONDON and WERNER, JJ., concur ; PARKER, Ch. J., not sitting.

Judgment reversed, etc.

JOHN GRAY, Respondent, v. THE KAUFMAN DAIRY AND ICE CREAM COMPANY, Appellant.

1. LEASE — SURRENDER BY OPERATION OF LAW. A surrender of leased premises is created by operation of law, although the landlord has declined an offer of surrender, where after the tenant has abandoned them the landlord lets them in his own name to a third person for a new term, without the tenant's consent.

2. ASSENT BY SILENCE. A tenant's assent to a new letting of premises which he has abandoned will not be implied by his failure to answer a letter from the landlord, saying that he would relet them on the tenant's account, so as to prevent a surrender by operation of law if the landlord subsequently relets them.

Gray v. Kaufman Dairy & Ice Cream Co., 16 App. Div. 631, reversed.

(Argued March 26, 1900; decided April 6, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 5, 1897, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term, a jury having been waived.

This action was brought to recover two months' rent of the premises known as No. 787 Eighth avenue, in the city of New York. In July, 1893, the plaintiff let the said premises to the defendant for ten years from August 1st, 1893, at the yearly

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rental of \$2,400, payable monthly in advance, and also the extra water rent charged against the defendant for its business. The defendant took possession about July, 1893, and paid rent to November 1st, 1893, but refused to pay for the months of November and December of that year, the rent of which became due and payable on the first days of those months respectively.

The answer, in effect, admits the making of the lease, but denies any indebtedness under it and sets up the eviction of the defendant, a surrender and rescission of the lease, and claims credit for the rent received from the undertenant. On or about the 28th or 29th of October, 1893, the plaintiff had a conversation with Mr. Kaufman, the president of the defendant, upon the demised premises. The plaintiff's version of this conversation is as follows: "They were pulling up the store and the things, and were going to move out. They had not said anything to me about moving out prior to that time. I asked Mr. Kaufman what he was doing, pulling up the store. He said he was going to move out, and I asked him why, and he said because he couldn't make any money, and I told him that he had a lease on it, and that I would hold him responsible for the rent if he went out. 'Well,' he says, 'I am moving out, I don't want to stay where I don't make my rent.'" The defendant moved out and sent the keys of the store to the plaintiff by mail. Plaintiff received them about the 2nd of November, 1893. On the 3rd of November, 1893, plaintiff served upon the defendant a notice of which the following is a copy:

"NEW YORK, November 3rd, 1893.

"To the Kaufman Dairy & Ice Cream Co.:

"Yesterday I received the keys of 787 Eighth Avenue by mail. I hereby notify you that I do not accept a surrender of the premises, and that I intend to hold you responsible for the rent under the lease. I shall let the premises on your account, and hold you for any loss which may be sustained.

"Yours, etc.,

"JOHN GRAY."

The defendant made no answer to this notice. On the 17th of November, 1893, the plaintiff went to Kingston and saw Mr. Kaufman, the president of the defendant, Mr. Spore, the secretary, and a Mr. Bruin. The plaintiff asked Mr. Kaufman for the November rent, and the latter replied that no rent was due; that he had not made a lease; that there was nothing due and he would not pay; that he had given up the store and plaintiff could do what he liked with it. Thereupon the plaintiff started for home. The president and secretary of the defendant went to the railway station and there had a conversation with the plaintiff about compromising the matter by taking the cellar of said premises for fifty dollars a month for the term of the lease if the plaintiff would cancel the same as to the rest of the premises. The plaintiff said he would think over the matter and see what he could do with the remainder of the property, and let them know. The plaintiff testifies that thereafter, and on the 27th of November, 1893, he wrote to the defendant as follows:

“KAUFMAN DAIRY & ICE CREAM Co.:

“GENTLEMEN.—I have an offer for the store you leased from me, 787 Eighth Ave. The parties will pay \$1,500 to the first of May and \$1,600 for three years from May. I think this is about as good an offer as can be expected, considering the times. Please let me know if you will keep the cellar and pay the difference between the \$1,500 and \$2,400 to May, and \$1,600 — \$2,400 after. An early reply will much oblige.

Yours respect.,

J. GRAY,

“323 Washington Ave.”

The plaintiff further testifies that he inclosed this letter in an envelope directed to the defendant at Kingston, N. Y., deposited it prepaid in the post office at Brooklyn and received no reply thereto. The defendant had tenants in the cellar when it left the premises. These tenants attorned to the plaintiff.

On or about the 1st of December, 1893, plaintiff let the premises which had been previously demised to the defendant

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to one Mary Ann Keogh for the term of three years and five months at an annual rental of \$1,500 per year for the first five months, and \$1,600 per year for the remaining three years, to be paid in equal monthly installments in advance.

The defendant pleaded eviction, but gave no evidence upon that subject, and upon the trial admitted that it had no excuse for leaving the premises. Kaufman admitted having a conversation with the plaintiff before the defendant left the premises, in which the plaintiff stated that he would hold the defendant for the rent, but denied that he, Kaufman, had stated that the defendant would not stay where it did not make any money. Kaufman also admitted the receipt of the letter dated November 3rd, but both he and Spore denied receiving the one dated November 27th. Both admitted the conversation testified to by the plaintiff as having taken place at Kingston, and Spore testified that on that occasion Kaufman stated distinctly that the defendant did not owe any rent; that it had given up and surrendered the premises; that there was some talk at the railroad station about renting the cellar from the plaintiff at fifty dollars per month during the term of the lease, but there was nothing said in that conversation about plaintiff's reletting the premises on defendant's account. Abraham L. Gray, a son of the plaintiff, testified on the latter's behalf that he went to Kingston with his father to see Kaufman and was present at the conversation at the railroad station. He testified that Mr. Spore offered the plaintiff fifty dollars a month for the basement if he would let the defendant off on the store, and the plaintiff replied that he would think it over and let them know. The lease to the defendant contained no provision against subletting, except for "any saloon or liquor business," and contained no provision for a reletting of the premises by the plaintiff in case the defendant vacated the same during the term of the lease.

After the evidence was all in, the parties waived the jury and submitted the facts to the court for decision. The defendant admitted its liability for the November rent, but claimed that it was released as to the December rent by the reletting

of the premises to said Mary Ann Keogh on the 1st of December. Upon these facts the court found that the plaintiff was entitled to recover rent for the months of November and December, less the amount received from the undertenants; that the plaintiff refused to accept a surrender of the premises; that the premises were at no time surrendered to the plaintiff, and that the reletting of the premises was done with the assent of the defendant.

David B. Hill for appellant. The reletting of the store by the landlord, in the absence of an agreement, express or implied, that he might do so as agent for the tenant, constituted an acceptance of surrender. (4 R. S. [8th ed.] 2589, § 6; *Coe v. Hobby*, 72 N. Y. 145; *Gray v. K. D. & I. C. Co.*, 9 App. Div. 115; *Bedford v. Terhune*, 30 N. Y. 462; *Smith v. Kerr*, 108 N. Y. 36; *Vandekar v. Reeves*, 40 Hun, 430; *Ballou v. Baxter*, 28 N. Y. S. R. 431; *Hurley v. Shering*, 17 N. Y. Supp. 7; *Beal v. White*, 94 U. S. 389; *Amory v. Knapp*, 117 Mass. 351; *Thomas v. Cook*, 2 Barn. & Ald. 119.) There is no evidence in the case upon which the finding of the trial court, that the defendant assented to the reletting, can be based. (*Farley v. Denton*, 3 C. & P. 109; *Commonwealth v. Eastman*, 1 Cush. 205; *Learned v. Tillotson*, 97 N. Y. 12; *Thompson v. Simpson*, 128 N. Y. 289; *Thomas v. Gage*, 141 N. Y. 510; *Vassar v. Camp*, 11 N. Y. 450; *People's Bank v. St. A. R. C. Church*, 109 N. Y. 523; *Marvin v. Wilber*, 52 N. Y. 270.) Since the reletting to Keogh by plaintiff was for a term exceeding one year, the authority to make such a lease on defendant's behalf could not be implied. (*Underhill v. Collins*, 132 N. Y. 272; *Chase v. S. A. R. R. Co.*, 97 N. Y. 388.) There being no agreement in writing authorizing plaintiff to relet, for defendant's account, the Keogh lease for a term exceeding one year, must be held to be in law, as it is in form, plaintiff's own lease since, as defendant's lease, it would be void under the Statute of Frauds for all purposes. (*Couderdt v. Cohn*, 118 N. Y. 310; *Dung v. Parker*, 52 N. Y.

496.) By making the Keogh lease in his own name, under seal, and without referring to his alleged authority to relet on defendant's account, plaintiff is estopped from denying that such lease is his own. (*Denike v. De Graff*, 87 Hun, 62; *Briggs v. Partridge*, 64 N. Y. 361; *Schaefer v. Henkel*, 75 N. Y. 381; *Henricus v. Englert*, 137 N. Y. 494; *Kiersted v. O. & A. R. R. Co.*, 69 N. Y. 345; *M. L. Ins. Co. v. Shipman*, 119 N. Y. 329.) Plaintiff was under no duty to relet the premises on defendant's behalf in order to reduce the damages. (*Underhill v. Collins*, 132 N. Y. 271; *Matter of Ludeke*, 33 App. Div. 399; *Clendinning v. Lindner*, 9 Misc. Rep. 682; *Matter of Hevenor*, 144 N. Y. 271.)

Jacob F. Miller for respondent. The premises were properly relet on defendant's account after due notice to it of such intention. (*Underhill v. Collins*, 132 N. Y. 269; *People ex rel. v. R. R. Comrs.*, 158 N. Y. 430; *Amherst College v. Ritch*, 151 N. Y. 320; *People v. Helmer*, 154 N. Y. 599; *Marden v. Dorothy*, 160 N. Y. 39; *Reed v. McCord*, 160 N. Y. 330.) When the defendant left the premises without excuse, the plaintiff, if he did not accept a surrender, was in duty bound to let the premises on behalf of defendant, or at least was at liberty to do so in order that the amount of damages might be made as small as possible. (*Miller v. Mariners' Church*, 7 Greenl. 51; *Shannon v. Comstock*, 21 Wend. 461; *Heckscher v. McCrear*, 24 Wend. 309; *Clark v. Marsiglia*, 1 Den. 317; *Spencer v. Halstead*, 1 Den. 606; *Soker v. Damon*, 17 Pick. 284; *Morgan v. Smith*, 70 N. Y. 537; *McAdam on Landl. & Ten.* 205, 210, 467, 475; *Johnson v. Meeker*, 96 N. Y. 96; *Bloomer v. Merrill*, 29 How. Pr. 259.) For the purpose of such letting the plaintiff was the agent for the defendant. (*Pollen v. Le Roy*, 30 N. Y. 556; *Dustan v. McAndrew*, 44 N. Y. 72; *Van Brocklen v. Smeallie*, 140 N. Y. 70; *Howard v. Daly*, 61 N. Y. 362; *Dillon v. Anderson*, 43 N. Y. 231; *Hamilton v. McPherson*, 28 N. Y. 72; *Clark v. Marsiglia*, 1 Den. 317; *Underhill v. Collins*, 132 N. Y. 270.) After the defendant had left the premises under the circum-

stances detailed in the evidence, the plaintiff might relet the premises on its account, and after the plaintiff had changed his position by reletting, it was too late for the defendant to retract its renunciation of the lease so made and reclaim the premises. (*Windmuller v. Pope*, 107 N. Y. 675; *Bernstein v. Meech*, 130 N. Y. 358.) Defendant not having objected to the reletting of the premises, its silence must be deemed an acquiescence in the making of the new lease on its account, and it is liable for the difference between the rent received and the rent obtained. (Herman on Estoppel, §§ 917, 932, 952, 954, 965, 978; *Packard v. Sears*, 6 Ad. & El. 474; *McClare v. Lockard*, 121 N. Y. 312; *Dailey v. Rector*, 50 Am. Dec. 245; *Thomas v. Sanborn*, 35 Am. Dec. 490; *Frost v. S. M. Ins. Co.*, 49 Am. Dec. 234; *Hall v. Fisher*, 9 Barb. 31; *Viele v. Judson*, 82 N. Y. 40; *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344.) The defendant's objection that the lease was made in the name of the plaintiff, and that, therefore, he must be held to have intended to let the premises on his own account, has no foundation. (*Thurston v. Cornell*, 38 N. Y. 287; *Tracy v. McManus*, 58 N. Y. 257; *Bayliss v. Crockcroft*, 81 N. Y. 371; *Bedell v. Chase*, 34 N. Y. 388; *McKown v. Hunter*, 30 N. Y. 628; *Porter v. Rickman*, 38 N. Y. 210.)

WERNER, J. This controversy arises out of the conventional relation of landlord and tenant under circumstances governed by fixed principles of law. The first and most important question in the case is whether the plaintiff's reletting of the premises described in the lease, after the defendant's attempted surrender of the same, changed or affected the legal status of the parties under the original lease. It is so well settled as to be almost axiomatic that a surrender of premises is created by operation of law when the parties to a lease do some act so inconsistent with the subsisting relation of landlord and tenant as to imply that they have both agreed to consider the surrender as made. It has been held in this state that "a surrender is implied, and so effected by operation of law within the statute, when another

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estate is created by the reversioner or remainderman with the assent of the termor incompatible with the existing state or term." (*Coe v. Hobby*, 72 N. Y. 145.) The existence of this rule has been recognized in this state in *Bedford v. Terhune* (30 N. Y. 463), *Smith v. Kerr* (108 N. Y. 36), *Underhill v. Collins* (132 N. Y. 271), and in other jurisdictions in *Beall v. White* (94 U. S. 389), *Amory v. Kannoffsky* (117 Mass. 351), *Thomas v. Cook* (2 Barn. & Ald. 119), *Nickells v. Atherstone* (10 Ad. & El. N. R. 944), *Lyon v. Reed* (13 M. & W. 306), and Washburn on Real Property (v. 1, pp. 477, 478). It is conceded that defendant's offer of surrender was declined by the plaintiff, and that after the defendant's abandonment of the premises the plaintiff relet the same in his own name to one Mary Ann Keogh for a term of three years and five months. Such a situation, unqualified by other conditions, would create a surrender by operation of law. We must, therefore, ascertain whether the conduct of the parties takes this case out of the operation of this rule.

It is urged by the learned counsel for the plaintiff that the reletting was done with the consent of the defendant under circumstances which bring the case directly within the rule laid down by Judge HAIGHT in *Underhill v. Collins* (132 N. Y. 270). In that case the landlord and tenant had a conversation a few days before the latter vacated the premises. The tenant asked the landlord to take the same off his hands. This the landlord declined to do, insisting that he would hold the tenant for the rent and would lease the premises for his benefit. In the case at bar there was also a conversation before the premises were vacated; but in this conversation there was nothing said about a reletting. The plaintiff simply said that he would hold the defendant for the rent. On the 2d of November, 1893, a day or two after defendant's removal, the plaintiff received the keys of the premises. He returned them with a note stating that he would relet on defendant's account and hold it responsible for any loss that may be sustained. To this note the defendant made no reply. On the 17th of November, 1893, the plaintiff and his son

went to Kingston and saw Kaufman and Spore. In the conversation which took place between them and the plaintiff there was no suggestion of reletting. The plaintiff made a demand for the rent which was unpaid, and the defendant made an offer of compromise, under which it agreed to take the cellar of said premises at fifty dollars per month if the plaintiff would cancel the lease as to the store. This offer the plaintiff agreed to consider. On the 27th of November, 1893, the plaintiff wrote to the defendant that he had an offer for the store of \$1,500 per year to the first of the next ensuing May, and \$1,600 per year for three years thereafter. He requested the defendant to let him know if it would keep the cellar and pay the difference between the rent fixed by the lease and the amount offered by the intending tenant. To this letter the defendant made no reply. It will be observed from this brief *resumé* of the facts that there are several distinct features in which this case differs from the *Underhill* case. In the latter case there was a personal interview before the tenant had vacated, in which the subject of reletting the premises was discussed. Here the subject of reletting was not mentioned until after the tenant went out, and then the suggestion came in a letter to which the defendant made no reply. Obviously the only theory upon which defendant can be held to have assented to the reletting of the premises is that by its silence it acquiesced in the act of the plaintiff. We may assume, although we do not decide, that if the communications upon the subject of reletting had been made verbally in the course of conversation between the parties, even after the tenant had vacated the premises, the rule as to agreements by implication laid down in the *Underhill* case might be held to apply. But here, as we have seen, the landlord's proposal to relet was in the form of two letters. In the first of these, dated November 3rd, he makes the unequivocal assertion that he will let the premises on defendant's account, and will hold it for any loss that may be sustained. Defendant's failure to reply to this letter is followed by a personal interview on the 17th of November, in which there is no reference to a

reletting of the premises, and in which defendant's president, after denying any liability for rent, tells the plaintiff to do what he likes with the premises. Then follows the letter of November 27th, informing the defendant of the offer which the plaintiff had received from an intending tenant, and asking defendant if it would pay the difference between the amount offered and the rent reserved in the original lease. It will be observed that, even if we were to give these written communications the same force and effect as verbal statements made in personal interviews between the parties, the facts here are easily differentiated from those in the *Underhill* case. There the tenant vacated the premises upon the offer of the landlord to relet for his benefit and under such circumstances as to permit the inference that he accepted the offer. Here the landlord's statement to that effect, made after the tenant's abandonment of the premises, is followed by negotiations in which the tenant expresses a willingness to keep the cellar at fifty dollars per month if the landlord will cancel the lease as to the rest of the premises. These steps are succeeded by a communication from the landlord, in which he requests the tenant to decide whether it will keep the cellar and pay the deficit which will arise by an acceptance of the offer which the former then had under consideration. It may well be doubted whether verbal declarations made in personal interviews between the parties, under the circumstances above narrated, would support the plaintiff's theory of this action. To create a contract by implication there must be an unequivocal and unqualified assertion of a right by one of the parties, and such silence by the other as to support the legal inference of his acquiescence. But it is clear, both upon principle and authority, that we have no right to indulge in the assumption that the letters above referred to have the force and effect of verbal statements made in the presence of the defendant's officers. The rule is precisely to the contrary. It is well expressed in *Learned v. Tillotson* (97 N. Y. 12) as follows: "We think that a distinction exists between the effect to be given to oral declarations made by one party to another,

which are in answer to or contradictory of some statement made by the other party, and a written statement in a letter written by such party to another. It may well be that under most circumstances what is said to a man to his face, which conveys the idea of an obligation upon his part to the person addressing him, or on whose behalf the statement is made, he is at least in some measure called upon to contradict or explain; but a failure to answer a letter is entirely different, and there is no rule of law which requires a person to enter into a correspondence with another in reference to a matter in dispute between them, or which holds that silence should be regarded as an admission against the party to whom the letter is addressed. Such a rule would enable one party to obtain an advantage over another and has no sanction in the law." To the same effect are *Bank of B. N. A. v. Delafield* (126 N. Y. 418) and *Thomas v. Gage* (141 N. Y. 506).

It is manifest, therefore, that the act of the plaintiff in reletting said premises under the circumstances referred to operated as an acceptance of the defendant's offer to surrender. The judgment herein can be supported upon no theory that is consistent with the established rules of law. As the views above expressed are decisive of the case, it is unnecessary to discuss the other questions raised by the defendant.

The judgment of the court below should be reversed and a new trial granted, with costs to abide the event.

LANDON, J. (dissenting). The trial court found as facts that "Plaintiff refused to accept a surrender of the premises, and did not accept it, and the premises were at no time surrendered to the plaintiff. The letting of the premises was done with the assent of the defendant." The order of affirmance by the Appellate Division does not state that it was unanimous, but that is not important here, for the record contains evidence tending to support the findings. The evidence tends to show that the defendant intended by its conduct to threaten the plaintiff with the loss of his rent, and thus to coerce him to relet the premises, and then deny its

assent, notwithstanding after its receipt of the plaintiff's first letter, it told the plaintiff he could do as he liked with the premises. The defendant thus replied to the plaintiff's letter, at least so the trial court, in view of all the circumstances, might find, and did find.

PARKER, Ch. J., GRAY, O'BRIEN and HAIGHT, JJ., concur with WERNER, J., for reversal; LANDON, J., reads dissenting memorandum; CULLEN, J., not sitting.

Judgment reversed, etc.

THE GLENS FALLS PORTLAND CEMENT COMPANY, Respondent,
v. THE TRAVELERS' INSURANCE COMPANY, Appellant.

1. FACTORY LAW CONSTRUED. The manifest purpose of the Factory Law (L. 1886, ch. 409, as amd. by L. 1892, ch. 673) was to give more force to the existing rule that masters should afford a reasonably safe place for their servants to work; not that every piece of machinery should be covered or guarded, but that those parts of the machinery which are dangerous to the servants whose duty requires them to work in its immediate vicinity should be properly guarded; nor does the statute attempt to specify how machinery shall be guarded otherwise than as "properly guarded," which in each case is a question of fact depending upon the situation, nature and dangerous character of the machinery.

2. VIOLATION OF FACTORY LAW A QUESTION OF FACT. A setscrew projecting about five-eighths of an inch from a collar at one end of a revolving shaft which is from fifteen to eighteen feet above the floor of a factory, out of reach of employees engaged in operating the machinery, and reached only by a ladder, by which it is approached only for the purpose of oiling the bearing, does not, as matter of law, violate the Factory Law, but the necessity for a guard in such a case is a question of fact.

3. INSURANCE AGAINST LIABILITY TO EMPLOYEES — EFFECT OF JUDGMENT AGAINST EMPLOYER. An insurance company which, by its contract, has agreed to defend actions against an employer for injury to employees, and which has conducted the defense in such a case down to the eve of trial, and has then withdrawn, leaving the employer no reasonable opportunity to prepare a defense in the action, is estopped from claiming that a judgment by default against the employer conclusively establishes the latter's negligence or violation of the Factory Law, which the insurance company sets up as a defense.

Glens Falls Portland Cement Co. v. Travelers' Ins. Co., 11 App. Div. 411, affirmed.

(Argued March 29, 1900; decided April 6, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered December 10, 1896, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

Francis A. Smith for appellant. At the time the policy was issued, and afterwards until the accident, the setscrew was entirely unguarded, and the plaintiff had express notice of the requirement of the statute to protect it. The clause in the application, promising to conduct all business and maintain all premises to which the proposed insurance may apply, in strict compliance with all statutes, ordinances and by-laws, providing for the safety of persons, was, by its express terms, made a part of the consideration of the policy, and of the policy itself. (*Cogswell v. Chubb*, 1 App. Div. 95; *Chase v. H. Ins. Co.*, 20 N. Y. 52; *Jackson v. S. P., F. & M. Ins. Co.*, 33 Hun, 60; *Ripley v. Æ. Ins. Co.*, 30 N. Y. 136; *Alexander v. G. F. Ins. Co.*, 66 N. Y. 464; *F. N. Bank v. Ins. Co. of N. A.*, 50 N. Y. 45.) There was no waiver of the warranty, or of any provisions of the policy, by the defendant. (*Bank of Chillicothe v. Dodge*, 8 Barb. 233; *Merchants' Bank v. Spalding*, 9 N. Y. 53; *Stedman v. Davis*, 93 N. Y. 32; *Trebilcox v. McAlpine*, 46 Hun, 469; *Ripley v. Æ. Ins. Co.*, 30 N. Y. 136; *Armstrong v. A. Ins. Co.*, 130 N. Y. 560; *G. El. Co. v. L. & L. & G. Ins. Co.*, 159 N. Y. 418; *Van Schaick v. N. F. Ins. Co.*, 68 N. Y. 442; *Chase v. H. Ins. Co.*, 20 N. Y. 52; *Moore v. H. F. Ins. Co.*, 141 N. Y. 219.)

Edgar T. Brackett for respondent. The provisions of the policy were not violated by the plaintiff, and the defendant never had any defense to plaintiff's claim. (*Spaulding v. T. & C. C. Co.*, 13 Misc. Rep. 398; *Freeman v. G. F. P. M. Co.*, 70 Hun, 530; *Glassheim v. N. Y. E. P. Co.*, 13 Misc. Rep. 174; *Cobb v. Welcher*, 75 Hun, 283; *Knisley v. Pratt*,

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75 Hun, 323; *Horton v. V. I. W. Co.*, 13 App. Div. 508; *Slocovich v. O. M. Ins. Co.*, 108 N. Y. 56; *Murray v. N. Y. L. Ins. Co.*, 85 N. Y. 236.) If the defendant ever had a defense to plaintiff's claim, such defense has been waived. (*Titus v. G. F. Ins. Co.*, 81 N. Y. 410; *Trippe v. P. F. Society*, 140 N. Y. 23; *Roby v. A. C. Ins. Co.*, 120 N. Y. 510; *Ins. Co. v. Eggleston*, 96 U. S. 572; *McNally v. P. Ins. Co.*, 137 N. Y. 389; *Shay v. N. B. Society*, 54 Hun, 109; *Haas v. M. F. Ins. Co.*, 49 Hun, 272; *Benninghoff v. A. Ins. Co.*, 93 N. Y. 495; *Pratt v. N. Y. C. Ins. Co.*, 55 N. Y. 505; *Shearman v. N. F. Ins. Co.*, 46 N. Y. 526.) Due notice of the accident was given to the defendant. (*Weed v. H. B. F. Ins. Co.*, 133 N. Y. 394; *Bennett v. L. C. M. Ins. Co.*, 67 N. Y. 274; *Griffey v. N. Y. C. Ins. Co.*, 100 N. Y. 417.)

HAIGHT, J. This action was brought upon a policy of insurance issued by the defendant to the plaintiff in November, 1894, by which defendant company undertook to insure the plaintiff for the term of one year against loss from liability to employees who might accidentally sustain bodily injuries while in the plaintiff's employ. The policy, among other things, provided that in case an accident should occur to an employee and a suit should be brought against the cement company to recover damages the insurance company should have the right to control the defense and defend the action on behalf of the cement company. In the application upon which the policy was issued the cement company agreed "to conduct all business and maintain all premises to which the proposed insurance may apply, in strict compliance with all statutes, ordinances and by-laws provided for the safety of persons."

On the 28th day of December, 1894, one Jasmine was employed by the plaintiff to attend a machine known as a clinker crusher. There extended through the building a revolving shaft from fifteen to eighteen feet above the floor, at one end of which there was a collar to prevent the end-

thrust. This collar was fastened to the shaft by means of a setscrew which projected about five-eighths of an inch from the collar and was immediately adjoining the bearing upon which the shaft revolved. Under this bearing was constructed a small platform which was reached by a ladder which was used only for the purpose of reaching the platform when necessary to oil the bearing. On the day in question, Jasmine ascended the ladder to the platform and undertook to oil the shafting at the point of the bearing. In doing so his sleeve was caught by the projecting setscrew and he was twisted around the shafting and seriously injured. He subsequently brought an action against the plaintiff company, alleging negligence on its part, which resulted in the recovery of a judgment, by default, for the sum of \$2,000 damages, which sum, with costs, the plaintiff has been compelled to pay, and which amount it now seeks to recover of this defendant under the policy. It further appears that the plaintiff gave notice to the defendant, through its local agent, of the accident, shortly after it occurred, and that when the action was brought the defendant employed an attorney who answered the complaint on behalf of the cement company and took charge of the defense of that action down to the Saturday preceding the Monday on which the case was to be moved for trial at the circuit; that, at that time, the insurance company disclaimed liability under the policy and declined to assume any further charge of the defense.

At the conclusion of the trial of this action the defendant's counsel moved for a nonsuit upon various grounds, which was denied, the court holding that there were questions of fact to be submitted to the jury, but remarked that, if both sides insisted upon a direction of a verdict and would leave the questions of fact to be decided by the court, it would dispose of the case. Thereupon both parties requested the court to direct a verdict, and in accordance with such request a verdict was directed in favor of the plaintiff for the amount demanded in the complaint, the court stating as one of its reasons for so doing that there was not sufficient evidence from which the

jury, or the court, in the place of the jury, could find that this setscrew was dangerous or one that was required to be further guarded.

The controlling question in the case brought up for review by the exceptions is the claim of the defendant that the plaintiff had forfeited its right to indemnity under the policy, for the reason that it had failed to maintain its premises in compliance with the Factory Law of 1886, chapter 409, as amended by chapter 673 of the Laws of 1892. That law, so far as is material here, provides that "All vats, pans, saws, planers, cogs, gearing, belting, shafting, setscrews and machinery of every description therein shall be properly guarded." The contention is that the plaintiff violated this statute by its neglect to guard the setscrew which caught in the clothing of Jasmine. The trial court, in construing this statute in connection with the facts presented by the evidence in this case, held that a question of fact arose as to whether the screw in question was properly guarded, and for that reason denied the motion for a nonsuit, and after the case had been submitted by both parties to the court for its determination of the facts as well as the law, the court ordered judgment for the plaintiff, thus finding that the screw was properly guarded. The judge writing the opinion in the Appellate Division seems to have differed with the trial judge in his determination of this fact, but the order entered upon the decision of that court in *all things* affirmed the judgment of the trial court.

There are but few cases to be found in our reports in which the provisions of the Factory Law have been construed, and those cases afford but little aid in construing the provision here involved. The manifest purpose of the enactment was doubtless to give more force to the existing rule that masters should afford a reasonably safe place in which their servants are called upon to work. We think, however, that the legislature could not have intended that every piece of machinery in a large building should be covered or guarded. This would be impracticable. What evidently was intended was that those parts of the machinery which were dangerous to the servants

whose duty required them to work in its immediate vicinity should be properly guarded, so as to minimize, as far as practicable, the dangers attending their labors. Human foresight is limited, and masters are not called upon to guard against every possible danger. They are required only to guard against such dangers as would occur to a reasonably prudent man as liable to happen. (*Cobb v. Welcher*, 75 Hun, 283.) In this case, as we have seen, the shafting was located from fifteen to eighteen feet above the floor of the factory, and the collar containing the offending screw was at one end of the building high above and out of the reach of the servants who were engaged in operating the machinery below. It could only be approached by a ladder, and the only necessity of approaching it at all was for the purpose of oiling the bearing under the shafting. It does not appear that any accident of this character had ever happened before at this bearing, or that it had ever occurred to any of the persons operating the factory that such an accident was possible or liable to occur. The statute does not attempt to specify how machinery shall be guarded otherwise than as "properly guarded." The necessity for the guard, and the character and description of the guard must, of necessity, depend upon the situation, nature and dangerous character of the machinery, and in each case becomes a question of fact. We think, under the evidence in this case, a question of fact was presented for the determination of the trial court, and that it could not be held, as a matter of law, that the screw in question was not properly guarded. It follows that the defendant was not necessarily relieved from liability under the policy by reason of the failure of the plaintiff to guard the screw in question, and that, consequently, the defendant had no right to withdraw from the defense of the action brought by Jasmine against the plaintiff.

It is contended that there has been an adjudication in the action of Jasmine against the cement company, that it was guilty of negligence in not guarding the setscrew in question. Undoubtedly, that adjudication is binding upon the cement company in so far as Jasmine is concerned. The judgment

roll in that action was introduced in evidence in this action. It fixed the amount that the cement company had been compelled to pay Jasmine; but we do not think that the adjudication in that action is binding upon the plaintiff in this action, for the reason that, under the contract of insurance, the insurance company had agreed to defend the action, and had conducted such defense down to the eve of the trial and then withdrew, leaving the cement company no reasonable opportunity to prepare its own defense to the action. Had the insurance company continued its defense it might have shown upon the trial that the cement company was free from negligence in the matter, and thus avoided a judgment against that company; but having withdrawn from the defense of that action improperly and permitted judgment to go against the cement company by default, it is now estopped from claiming that the adjudication thus obtained precludes the plaintiff from insisting upon the indemnity which the defendant had contracted to render.

Some exceptions were taken to the admission and rejection of evidence, but none which, we think, requires a reversal.

The judgment should be affirmed, with costs.

PARKER, Ch. J., GRAY, O'BRIEN, CULLEN and WERNER, JJ., concur; LANDON, J., not sitting.

Judgment affirmed.

MARY W. LYNDE, Respondent and Appellant, v. CHARLES W. LYNDE, Appellant and Respondent.

1. FINAL DECREE FOR ALIMONY IN ANOTHER STATE AGAINST A RESIDENT OF THIS STATE—JURISDICTION ACQUIRED BY GENERAL APPEARANCE. A court of another state which, by the law of that state, has power to amend a decree of divorce previously rendered therein against a resident of this state, by the insertion of provisions for alimony alleged to have been inadvertently omitted therefrom, acquires jurisdiction to render a final decree for the payment of alimony, against him, upon a motion for such amendment, where he was personally served in this state with notice thereof, and he made a general appearance and contested it,

162	405
165	555
162	405
181	186

although the decree of divorce was invalid as to him because rendered without jurisdiction.

2. CONSTITUTIONAL LAW—ENFORCEMENT OF FOREIGN DECREE. In an action here upon such a decree, the provision of the Federal Constitution that full faith and credit shall be given in each state to the judicial proceedings of every other state (U. S. Const. art. 4, § 1), requires the courts of this state to give it full credit and effect as a judicial debt of record against the defendant for the amount fixed at the time of its rendition, but the law of this state does not permit the plaintiff, in aid of a judgment recovered upon the decree, to invoke the equitable remedies provided by the Code of Civil Procedure for the enforcement of a decree for alimony, inasmuch as they are available only in aid of decrees of divorce rendered in this state.

3. PROVISION FOR THE PAYMENT OF FUTURE ALIMONY. A provision in such foreign decree for the payment of alimony in the future, however, remaining subject to the discretion of the foreign court, lacks that conclusiveness which requires the courts of this state to enforce it, inasmuch as the provision of the Federal Constitution referred to should be deemed to relate to judgments or decrees which not only are conclusive in the jurisdiction where rendered, but which are final in their nature.

4. EQUITABLE REMEDIES NOT ENFORCEABLE IN THIS STATE. Provisions in such decree for methods to enforce payment, and a subsequent order which sought to carry it into effect by the equitable remedies of a receivership and injunction, cannot be enforced in this state, because they are in the nature of execution and operative upon the defendant only as he or property belonging to him may be found within the jurisdiction of the foreign court.

Lynde v. Lynde, 41 App. Div. 280, affirmed.

(Argued February 14, 1900; decided April 6, 1900.)

CROSS-APPEALS from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 16, 1899, modifying and affirming as modified a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This action was brought upon a final decree of the Court of Chancery of the state of New Jersey; which, as the result of proceedings to recover alimony, adjudged that the plaintiff is entitled to recover of the defendant the sum of \$7,840, and a counsel fee of \$1,000; that the defendant pay to her permanent alimony at the rate of \$80.00 a week from the date of the decree and that he give security for the payment of the

several sums directed by the decree to be paid and, further, provided, upon his failure to comply with the decree, that application might be made for sequestration proceedings, for a receivership and for an injunction. The complaint, also, asked to have enforced an order, made subsequently to the final decree, which appointed a receiver and enjoined the defendant from disposing of his property, etc.

The plaintiff and the defendant were married in the state of New Jersey in 1884, and were domiciled there. In 1892 the plaintiff filed her petition in chancery in that state, which alleged, among other things, desertion by her husband and cruel treatment, and prayed that she might be divorced from him and that reasonable alimony might be decreed to be paid to her. The defendant was not served personally, but by publication of process, and did not appear in the action nor answer the petition. Thereafter such proceedings were had in the case that, in 1893, a final decree was made, divorcing the petitioner from the defendant upon the ground of his willful and continued desertion, but containing no provision with respect to alimony. In 1896, the plaintiff filed a petition, upon affidavits, for the amendment of the decree of divorce, so as to provide for an award of alimony. The grounds of the application were that, though her petition in the divorce proceedings prayed for alimony, through the inadvertence, or neglect of her solicitor, the decree was entered without making provision adjudging the payment of alimony, or reserving the consideration thereof for hearing upon a future application. An order was granted by the chancellor, directing the defendant to show cause why the petition should not be granted; which, with the moving papers, was personally served upon the defendant in this state. The defendant appeared in opposition to the application, by J. Herbert Potts, as his solicitor, and without any reservation upon the record as to the appearance. He filed an affidavit, in which he alleged that his residence was in the state of New York; that he "was by the decree of this court divorced from the said petitioner from the bond of matrimony, upon her peti-

tion, on August 7th, 1893, and that since that time he has been married again to another woman, with whom he is now living," etc.; that "the decree for divorce was purposely drawn without providing for, or reserving any alimony," etc.; that he was "financially unable to pay alimony" and "that he is advised by counsel and believes that the said decree having been made without reserving the question of alimony, and this defendant having been absolutely divorced from the said petitioner by said decree, and having since formed new relations and matrimonial obligations, that it would be illegal, inequitable and unjust to now impose upon him the burden of alimony, so long after the granting of said absolute decree dissolving his first matrimonial relations absolutely without terms."

After testimony had been taken, pursuant to an order of the chancellor, during the course of which Mr. Potts appeared as defendant's solicitor, and after argument upon the same by the solicitor for the petitioner and the solicitor for the defendant, the chancellor ordered that the decree of divorce theretofore made should be amended by inserting therein that "it is further ordered, adjudged and decreed that the petitioner, Mary W. Lynde, shall have the right to apply to this court at any time hereafter, at the foot of this decree, for reasonable alimony and such other relief in the premises touching alimony as may be equitable and just, and this court reserves the power to make such order or decree as may be necessary to allow and compel the payment of alimony to petitioner by defendant, or to refuse to allow alimony." It appears in the opinion of the chancellor, which is made a part of the record, (54 N. J. Eq. 473), that he was satisfied that the omission of the decree to reserve the question as to alimony was due to the inadvertence of the petitioner's counsel and that, under the rule recognized by the court, it will "amend its enrolled decree when the amendment is necessary to give full expression to its judgment." From the order amending the decree of divorce, the defendant appealed to the Court of Errors and Appeals; where the order was affirmed. Thereupon, after reciting the various

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Statement of case.

proceedings relating to the amendment of the decree of divorce, an order of reference was made as to whether alimony should be allowed to the petitioner and, if so, how much. This order was entered after service of a notice upon the defendant's solicitor and the reference was proceeded with after personal service upon the defendant of a summons to attend. Neither the defendant, nor his solicitor, appeared upon the reference, although duly notified, and such proceedings were had that the final decree herein sued upon was made, on December 28th, 1897, by the chancellor; which, after reciting the proceedings had and the report of the master to whom it had been referred to report as to alimony, and "adjudging that a money judgment should be rendered against the defendant," adjudged and decreed as first hereinabove briefly described. Thereafter, upon proof of the failure of the defendant to comply with the final decree, an order dated February 8th, 1898, [referred to in the complaint as of "24th day of March, 1898"] was made, appointing a receiver of the defendant's property in New Jersey and directing the issuance of an injunction, etc. The receiver was unable to obtain possession of any of the defendant's property in New Jersey and the defendant did not comply with the decree in any respect.

The trial court decided that the plaintiff was entitled to a judgment against the defendant, enforcing against him the decree of the chancery court of New Jersey and further enforcing against him the order of that court which provided for the enforcement of the decree by the appointment of a receiver and by an injunction. She was held entitled to judgment against the defendant for the amount of alimony, counsel fee and costs due, or incurred, under the New Jersey decree; for the amount of alimony accrued since the decree; that he pay to her the sum of \$80.00 a week from the date of the decision, as and for permanent alimony; that he give a bond in the sum of \$100,000, to secure the payment of the several sums of money specified and that, upon his failure to comply with the provisions of the decision, a receiver might be appointed, ancillary to the receiver appointed by the Court

of Chancery of New Jersey. Exceptions were filed to the decision and, thereafter, judgment was entered in conformity with the decision. The Appellate Division, upon the defendant's appeal, modified the judgment, so as to adjudge that the plaintiff recover of the defendant the sum of \$8,840, and, as so modified, affirmed it. The amount of the recovery, as allowed by the Appellate Division, represents the only, and the precise, amount of money, which the final decree of the court in New Jersey adjudged to be due and payable from the defendant to the plaintiff, at the date of its rendition. Cross-appeals were taken by the parties from the judgment of the Appellate Division; the plaintiff because of its modification, and the defendant because of its affirmance, of the judgment of the trial court.

John H. Kemble and *George S. Ingraham* for defendant, appellant and respondent. The original decree of divorce was and is void as against the defendant for want of jurisdiction. (*People v. Baker*, 76 N. Y. 78; *O'Dea v. O'Dea*, 101 N. Y. 23; *Atherton v. Atherton*, 155 N. Y. 129; *Matter of Kimball*, 155 N. Y. 62; *Jacobs on Domicile*, § 47; *Potter v. Ogden*, 136 N. Y. 384; *Kilburn v. Woodworth*, 5 Johns. 37; *Harlaness v. Hyde*, 98 U. S. 476; *Owens v. Henry*, 161 U. S. 642; *H. M. & M. Co. v. Johnson*, 173 U. S. 221.) The void decree for divorce will not support a judgment *in personam* awarding alimony. (*Beard v. Beard*, 21 Ind. 321; *Lytle v. Lytle*, 48 Ind. 200; *Middleworth v. McDowell*, 49 Ind. 386; *Prosser v. Warner*, 47 Vt. 667; *Harding v. Alden*, 9 Me. 140; *Garner v. Garner*, 56 Ind. 127; *Van Storch v. Griffin*, 71 Penn. St. 240; *People v. Baker*, 76 N. Y. 78; *Van Voorhis v. Brintnall*, 86 N. Y. 18; *de Meli v. de Meli*, 120 N. Y. 485.) An appearance only in a supplemental proceeding will not render an otherwise void judgment of another state valid. (*Ward v. Boyce*, 152 N. Y. 191; *Stuart v. Palmer*, 74 N. Y. 183; *Davidson v. Board Ad., etc.*, 96 U. S. 97.) The defendant's subsequent marriage could not validate the decree. (*Rigney v. Rigney*, 127 N. Y. 408.)

James Westervelt, Henry B. Gayley and Matthew C. Fleming for plaintiff, respondent and appellant. The facts admitted by the pleadings show that the New Jersey Court of Chancery had unquestionable jurisdiction to award alimony to the plaintiff against the defendant, and to make the decree and order which it did make. (*Fleischmann v. Stern*, 90 N. Y. 110; *E. R. El. L. Co. v. Clark*, 18 N. Y. Supp. 463; *Beard v. Tilghman*, 66 Hun, 12; *Ritchie v. McMullen*, 159 U. S. 235; *Hoffheimer v. Stiefel*, 39 N. Y. Supp. 714; *Hill v. Mendenhall*, 21 Wall. 453; *Brown v. Balde*, 3 Lans. 283; *Aspinwall v. Aspinwall*, 53 N. J. Eq. 684; *Hunt v. Hunt*, 72 N. Y. 217; *Campbell v. Campbell*, 90 Hun, 233.) The proofs submitted at the trial show that the decree and order sued on were duly made and entered and are binding on the defendant personally in the state of New Jersey. (*Lynde v. Lynde*, 54 N. J. Eq. 473; 55 N. J. Eq. 591; *Crane v. Brigham*, 3 Stock. Ch. 29; *Rigney v. Rigney*, 53 Hun, 457; 127 N. Y. 408; *Laing v. Rigney*, 160 U. S. 531; *Crowell v. Bottsford*, 1 C. E. Green, 458; *Forrest v. Forrest*, 25 N. Y. 501; *Galusha v. Galusha*, 138 N. Y. 272; *Hauscheld v. Hauscheld*, 33 App. Div. 296; *Ostrander v. Weber*, 114 N. Y. 95; *Taylor v. Taylor*, 43 N. Y. 578.) The Constitution of the United States requires that full faith and credit be given to the decree and order of the New Jersey court. As that court had jurisdiction of the parties and of the subject-matter of the suit, the courts of this state are bound to give to that decree the same binding force and effect here that it has in New Jersey. (U. S. Const. art. 4; U. S. R. S. § 905; *Dobson v. Pearce*, 12 N. Y. 156; *Fletcher v. Ferrell*, 9 Dana, 372; *Cheever v. Wilson*, 9 Wall. 108; *Barber v. Barber*, 21 How. [U. S.] 582; *Shields v. Thomas*, 18 How. [U. S.] 253; *Nations v. Johnson*, 24 How. [U. S.] 195; *Youngs v. Carter*, 10 Hun, 194; *Sherman v. Felt*, 2 N. Y. 186.) The Appellate Division erred in modifying the judgment of the Special Term. (*Knapp v. Knapp*, 59 Fed. Rep. 641; *Brisbane v. Dobson*, 50 Mo. App. 170; *Bullock v. Bullock*, 57 N. J. L. 508; *Lynch v. M. E. Ry. Co.*, 129 N. Y. 280; *Van Allen v. N. Y. E. R. Co.*, 144 N.

Y. 174; *Inderlied v. Whaley*, 85 Hun, 63; *Kilbourne v. Bd. of Suprs.*, 137 N. Y. 170; *Pennington v. Gibson*, 16 How. [U. S.] 65; *Thompson v. Thompson*, 52 Hun, 456; *Wetmore v. Wetmore*, 149 N. Y. 520.)

GRAY, J. I think that the Appellate Division has very correctly decided the questions in the case and the opinion of Mr. Justice BARTLETT, speaking for that court, leaves little, if anything, to be added to its reasoning. With respect to the main question, whether the Court of Chancery of the state of New Jersey acquired jurisdiction over the defendant to render the final decree for the payment of alimony, it is argued, in his behalf, that the decree of divorce was invalid as to him and, therefore, afforded no support for the decree of alimony. That the decree of divorce was of no force as to him cannot be disputed. It is quite settled, at the present day, that no state can exercise jurisdiction and authority over persons, or property, without its territory. Its laws and the judgments of its tribunals can have no extra-territorial operation; except so far as the former may be allowed such by comity. The decree of divorce, which the plaintiff obtained in New Jersey, was effectual to determine her status as a citizen of that state towards the defendant; but as to him it effected nothing and was void for want of personal service of process, or of an appearance by him in the divorce proceedings. One, or the other, of these conditions was required to be shown to enable the court to proceed with jurisdiction *in personam*. As the service of process was constructive, by publication, however authorized by the laws of the state, it was ineffectual against the defendant for any purpose. (*People v. Baker*, 76 N. Y. 78; *Matter of Kimball*, 155 ib. 62; *Pennoyer v. Neff*, 95 U. S. 714; Story's Conflict of Laws, sec. 539.)

This action, however, is upon a final decree of the chancery court of New Jersey, which rendered a money judgment *in personam* against the defendant in a proceeding in which there was a voluntary appearance on his part. Upon service

of the order of the chancellor, directing him to show cause why the petition of the plaintiff for the amendment of the decree of divorce should not be granted, he appeared in the proceeding, without any reservation of record, and without making any objection to the jurisdiction of the court. Not only was that so, but in his affidavit, which was filed in the proceeding, he asserted that he had been divorced from his matrimonial relations upon the plaintiff's petition; that he had subsequently married again and his objections to the granting of the plaintiff's petition were carefully formulated. He alleged that "the decree for divorce * * * was purposely drawn without providing for, or reserving any alimony," etc.; that he was "financially unable to pay alimony," and "that the said decree of divorce having been made without reserving the question of alimony, and this defendant having been absolutely divorced from said petitioner by said decree, and having since formed new relations and matrimonial obligations, that it would be illegal, inequitable and unjust to now impose upon him the burden of alimony," etc. In short, he appeared and submitted himself to the jurisdiction of the court, appealing to its consideration of the facts and not objecting to its power to proceed; not repudiating the divorce, but relying upon it. There cannot be the slightest question that his appearance was general. He was represented by counsel, until the order of the chancellor, which amended the decree of divorce by reserving to the petitioner the right to apply at the foot thereof for alimony and to the court the power to make any further order with respect thereto, had been affirmed by the Court of Errors and Appeals, upon his own appeal, and until the application for a reference to determine the amount of alimony. Is he, then, in a position to invoke the invalidity of the original decree of divorce? As he was not personally served and did not appear in the divorce action, the decree divorcing the plaintiff could not have given her any judgment *in personam*. It did not reserve the right to apply thereafter for alimony, when jurisdiction *in personam* was

obtained of the defendant; but that was an unintentional omission, as the chancellor decided, which was due to the inadvertence of plaintiff's counsel and would be remedied by amending the decree. The affirmance of the order, in that respect, on defendant's appeal, settled the law of that state to be that the court may, upon petition, amend its enrolled decree, when the amendment is necessary to give full expression to its judgment and is matter which would, without doubt, have been incorporated in the decree when made, if attention had been called to it. (*Lynde v. Lynde*, 54 N. J. Eq. 473.) The demand for alimony in a divorce suit is not an essential part of the cause of action; but is merely incidental to the action and the judgment. (*Forest v. Forest*, 25 N. Y. 501; *Galusha v. Galusha*, 138 ib. 272, 281; *Lynde v. Lynde*, *supra*.) In *Kamp v. Kamp* (59 N. Y. 212), the question was not up as to whether the court might amend its judgment granting divorce, simpliciter, when the omission to reserve the question of alimony was shown to have been through inadvertence. The application there was for an order directing the payment of alimony, upon a judgment of divorce which was silent as to alimony, and it was held that the power to allow it in subsequent proceedings does not exist, in view of the legal presumption that the judgment had finally decided every question involved in the action; which would include the right of the plaintiff to claim alimony.

In my opinion, assuming, as we must, that the decree of the chancery court, which amended the original decree of divorce, expressed the law of the state of New Jersey, (*Laing v. Rigney*, 160 U. S. at p. 542), jurisdiction was obtained over the defendant by his appearance, plea and submission, to so far cure the invalidity of the divorce decree as to render it effective as a basis for alimony proceedings. But whether its invalidity was cured, or not, in the subsequent proceeding to which the defendant was a party, a final decree was entered adjudging that he pay to the plaintiff a certain sum of money. The jurisdiction once obtained could not be divested by his refusal to appear in the later stages of the

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Opinion of the Court, per GRAY, J.

proceeding. He cannot now attack the final decree of the court collaterally, after having had his day in court. In *Laing v. Rigney* (*supra*), after the wife had filed a bill against her husband in the Court of Chancery, in the state of New Jersey, alleging acts of adultery and the defendant had appeared and answered denying the allegations, the plaintiff filed a supplemental bill; wherein she alleged that the defendant had committed adultery with a person named, since the commencement of the suit, and prayed that she might have the same relief against the defendant as she might, if the facts had been stated in the original bill. Process upon the supplemental bill could not be served personally upon the defendant, who was a non-resident, and there was a substituted service by publication. He filed no answer to the supplemental bill, nor did he appear, and a final decree was rendered by the chancellor granting the divorce and awarding alimony, etc. An action was then brought in this state by the wife upon the decree, to recover against her husband the amount awarded for alimony and costs, and the question was whether the New Jersey court had jurisdiction to render the decree. In the Supreme Court of the United States, to which the case was taken from this court (127 N. Y. 408), by writ of error, it was held that, in affirming the dismissal of the plaintiff's complaint upon the trial, due effect had not been given to the provisions of article four of the Constitution of the United States, which require that full faith and credit shall be given in each state to the judicial proceedings of every other state. It was conceded that if the judgment of the Court of Chancery was not binding upon the defendant therein, personally, in that state, no such force could be given to it in the state of New York; but it was held that the law of the state of New Jersey must be deemed to be as declared by the chancellor, who had rendered a final decree, based upon the original bill, the process under which had been served upon the defendant within the state, and upon the supplemental bill, a copy of which, with the rule to plead, had been served upon the defendant without the state. It was said that "so long as

this decree stands, it must be deemed to express the law of the state. If the defendant deemed himself aggrieved thereby, his remedy was by appeal." In other words, the Supreme Court of the United States held that the New Jersey court having once acquired jurisdiction of the defendant in the action, whether it retained that jurisdiction, so as to render the final decree in the proceedings leading thereto, was a question depending upon the law of that state, which could not be attacked collaterally.

Laing v. Rigney is much in point; inasmuch as jurisdiction of the defendant, in this case, having been obtained in the proceeding, it was retained by the court until it made the final decree. The jurisdiction conferred the power to render the decree and it will be regarded as valid and binding until set aside in the court in which it was rendered. (*Kinnier v. Kinnier*, 45 N. Y. p. 542.)

Ward v. Boyce, (152 N. Y. 191), has no application. The action was upon a promissory note, made by the defendant to the plaintiff's order, and the issue between the parties was as to the plaintiff's ownership. The defendant claimed that the record of a certain proceeding in a Justice's Court, in the state of Vermont, was conclusive evidence that the note was not her property, but was that of her husband. The proceeding in the Vermont court was by way of trustee process and was instituted by a creditor of Mr. Ward, this plaintiff's husband, against him and Boyce, the maker of the note, as his debtor. Ward was a non-resident, did not appear and judgment went against him by default. Boyce, the other defendant, appeared and stated that he gave the note to Mrs. Ward for cattle purchased and he asked that she be cited to appear. A citation was served upon her, in the state of Vermont, to show cause why the note should not be adjudged to be held as her husband's property by his creditor. She did not appear and judgment was rendered in conformity with the terms of the citation. We held that the judgment did not conclude Mrs. Ward; because she was not a party to the proceeding and was cited to appear at a stage of it, when she had no oppor-

tunity to litigate the fundamental issue. The principal fact had then been adjudged, that the indebtedness for the cattle, for which the note was given, was owing to the husband; and this in a special statutory proceeding, in which the court had acquired no jurisdiction by service of any process upon him, or upon his wife, who held the note. When she was cited, it was not that she might contest the validity of the judgment against her husband; but merely to show cause why the note she held should not be adjudged as her husband's property and to be held by his creditor. I can perceive no resemblance in the principle of the decision in *Ward v. Boyce* to that involved here.

I am satisfied, without further discussion, that the Court of Chancery in New Jersey had ample jurisdiction to render the final decree, now in question, against the defendant.

With respect to how far the Supreme Court of this state will enforce the final decree of the New Jersey court, I think the determination of the Appellate Division to be quite correct. The action was to recover upon a final decree of the court of another state, which, being rendered with jurisdiction over the person of the defendant, is to be deemed conclusive, in so far as it adjudged the defendant to be indebted to the plaintiff at the date of its rendition. The proceeding in chancery had terminated in an unconditional decree that the defendant must pay a definite sum of money, established as a debt against him, and, therefore, it had extra-territorial value and force. (Wharton Conf. Laws, § 804.) As a debt of record against the defendant the courts of this state should give it full credit and effect; but as to its other provisions for future alimony and for equitable remedies to enforce compliance, I do not think we should say that it falls within the rule of the Federal Constitution. I do not think that the courts of this state should give effect to the decree by enforcing any of the collateral remedies, ~~which the prevailing party may be~~ entitled to in New Jersey and which the subsequent order gave to her.

So far as it made provision for the payment of alimony in

the future, it remained subject to the discretion of the chancellor and lacked conclusiveness of character. The chancellor's action was not final on the subject. As he observed in *Lynde v. Lynde* (*supra*), referring to the law of New Jersey: "The statute exhibits an intention that the subject shall be continuously dealt with according to the varying condition and circumstances of the party." The provision of the Federal Constitution, which requires that full faith and credit shall be given to the judicial proceedings of another state, in my opinion, should be deemed to relate to judgments, or decrees, which not only are conclusive in the jurisdiction where rendered, but which are final in their nature. If they, once and for all, establish a debt, or other obligation, against a party, the record is available in other jurisdictions as a foundation for a judgment there.

The provisions of our Code for the enforcement of a direction, in a judgment of divorce, for the payment of alimony, by equitable remedies, pertain only to such judgments as are recovered here. (Art. IV, chap. 15.) The jurisdiction of the Supreme Court of this state to dissolve a marriage is conferred solely by statute and its provisions upon the subject of alimony are not available to the plaintiff in aid of her decree.

The plaintiff's decree was, therefore, available to her as evidence in this action that the subject-matter of the proceedings leading to its rendition, viz.: the liability for alimony, had become a debt of record in the state of New Jersey, which could not be avoided but by plea of *nul tiel* record. (*M'Elmoyle v. Cohen*, 13 Peters [U. S.], 312, 324.)

The case of *Barber v. Barber* (21 How. [U. S.] 582), cited by the plaintiff in support of her claim that the decree of the New Jersey court should be enforced in all its parts, was not parallel in its facts and the observations of Justice WAYNE, which are referred to, if intended as supposed, were not necessary to the decision of the particular question. In that case the wife had obtained a judgment of divorce from her husband in the Court of Chancery of this state and the final

decree awarded her a sum of money representing alimony retrospectively due to her, for the interval between the filing of the bill and the rendition of the decree; directed execution therefor and, further, ordered the payment of permanent alimony in the future, *during her life*, in quarterly payments, which was "vested in her for her own and separate use and as her own and separate estate, with full power to invest the same * * * to dispose of the same by will, or otherwise, from time to time during her life, or at her death," etc. The husband then left this state and went to Wisconsin. A bill was filed there, in the United States court, by the wife, through her next friend, setting forth the proceedings had in the New York court and the decree; charging the husband with not having paid any part of the alimony adjudged to his wife and alleging that there was then due to her a certain amount of money on that account. In his answer, he admitted the rendering of a decree of divorce after contestation and that by it he "was subjected to the payment of alimony to the extent and in the way it is claimed in the bill," and alleged that, as he had obtained a divorce from his wife in Wisconsin, she thereby, "became a *feme sole* and being so, could not sue by her next friend," etc. The action resulted in a decree, adjudging that a stated amount of money "is due from the defendant upon the alimony sued for" and, upon his default in payment, ordering execution therefor. It will be observed that the situation of the parties was quite other than it is here; that the decree of the New York court was the basis of a bill in equity in the Federal court and that its finality as an adjudication with respect to alimony, past due and in the future — (in which latter respect it was made a vested estate in her for life) — was admitted by the answer to the bill. It will also be observed that the decree obtained in the United States court, in Wisconsin, merely adjudged a certain amount to be due complainant which the defendant must pay. The question in the case was stated to be, whether the wife might sue in another state "by her next friend, in equity, in a court of the United States, to carry into judgment the decree" and much of the

discussion proceeded upon the jurisdiction in equity. As to the nature of a decree which awards alimony, it was remarked, in the course of the opinion, that when the court, having jurisdiction of the wife's suit for divorce, allows her alimony, "it becomes a judicial debt of record against the husband." As Mr. Justice BARTLETT very correctly suggests, in his examination of *Barber v. Barber*, Mr. Justice WAYNE, when he further observed in his opinion that the wife might sue her husband in another jurisdiction, "to carry the decree into a judgment there with the same effect that it had in the state in which the decree was given," could not have intended that she could carry with her judgment into another state the right to any particular remedies for its enforcement; because that would have been in conflict with the rule which he had laid down many years earlier in *M'Elmoyle v. Cohen* (*supra*).

So far, therefore, as the final decree of the court in New Jersey adjudged moneys to be due and payable to the plaintiff from the defendant, it became a judicial debt of record, which the former was entitled to have enforced by the courts of this state, under the provisions of the Federal Constitution, and a judgment recovered thereupon could be executed only as our laws permit, (*Barber v. Barber*, *supra*, at p. 324); which would not include the particular equitable remedies, provided by the statute in the chapter on matrimonial actions. So far as the plaintiff's decree provided for methods to enforce payment, its provisions were in the nature of execution and operative upon the defendant only as he, or property belonging to him, might be found within the jurisdiction of the courts of New Jersey.

The subsequent order, dated February 8th, 1898, and which is set out in the complaint, (but referred to as of March 24th, 1898), is not enforceable here; for it was merely an order which sought to carry the final decree into execution within the state by the equitable remedies of a receivership and of an injunction. No action will lie upon such an order. (*Sheehy v. P. Life Assur. Co.*, 2 C. B. [N. S.], at p. 256.)

I advise an affirmance of the judgment, without costs.

LANDON, J. I concur in the opinion of GRAY, J., in overruling the defendant's appeal. I would go further and sustain the plaintiff's appeal. The plaintiff seeks such equitable judgment in this state as shall give full faith, credit and effect to a decree of the Court of Chancery of New Jersey awarding her alimony against her husband. The case embraces a Federal question, and the decisions of the United States Supreme Court become authoritative so far as they are applicable. The question is not whether the jurisdiction of the courts of this state to grant alimony is equitable or statutory, but whether a plaintiff who has obtained a decree for alimony in another state can in an equitable action in this state, upon sufficient allegations and proofs, not only obtain judgment upon such foreign decree, but also such means of enforcing it as are suited to periodical payments, and the peculiar duty incumbent upon the husband in respect of alimony, which means equity alone can give. *Barber v. Barber* (21 How. [U. S.] 582) holds that equity has jurisdiction in such a case. In *Wood v. Wood* (7 Misc. Rep. 579) the court refused to follow the decision, and the Appellate Division has adopted the refusal. But the case there was upon a French decree, and no Federal question existed, and the court was not bound by the authority of the *Barber* case. It is otherwise here. If equity has jurisdiction, then it can adapt its remedies to the exigencies of the case. This the Special Term did, and I think did right.

PARKER, Ch. J., HAIGHT and WERNER, JJ., concur; LANDON, J., concurs in memorandum; O'BRIEN, J., not voting; CULLEN, J., not sitting.

Judgment affirmed.

JOHN C. RODGERS, Appellant, v. FRANK H. CLEMENT,
Respondent.

1. PARTNERSHIP — RIGHT TO INTEREST UPON ADVANCES BY PARTNER TO FIRM. A partner is entitled to interest upon advances of money made to the firm without any express agreement respecting interest, when those advances are in fact loans, with respect to which he is a creditor of the firm; but he is not entitled to interest on his contributions to the capital of the firm or additions thereto, unless there is a special agreement that he shall have interest thereon.

2. APPEAL — PRESUMPTION AS TO FINDING OF REFEREE. A referee's finding that a partner is not entitled to interest "on his advances of money to and for the use of the firm," because there was no agreement for interest, cannot be sustained by virtue of a presumption that he found every fact necessary to support the judgment, and, therefore, must have found that the advances were not loans but contributions of capital, where the complaint alleges that the plaintiff loaned large sums of money to the firm, which have not been repaid, and the answer denies these allegations but admits that certain loans were made, and alleges a repayment thereof, without making any claim that the advances were capital.

Rodgers v. Clement, 15 App. Div. 561, reversed.

(Argued March 27, 1900; decided April 6, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered April 19, 1897, modifying and affirming as modified a judgment in favor of defendant entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

David B. Hill, *L. Laflin Kellogg* and *Alfred C. Petté* for appellant. The plaintiff is entitled to a credit on the accounting for the sum of \$5,860.93, interest on loans and advances made by him to the firm. (*Cronin v. Lord*, 161 N. Y. 90; *Meserole v. Hoyt*, 161 N. Y. 59; *Szuchy v. H. C. & I. Co.*, 150 N. Y. 219; *Farleigh v. Cadman*, 159 N. Y. 169; *Hilton v. Ernst*, 161 N. Y. 226; *Beardsley v. Cook*, 143 N. Y. 144; *O'Brien v. B. T. Co.*, 31 App. Div. 632; *Israel v. M. Ry.*

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Points of counsel.

Co., 158 N. Y. 624; *Parsons v. Parker*, 159 N. Y. 16; *Koehler v. Hughes*, 148 N. Y. 507; *Randall v. N. Y. El. R. R. Co.*, 149 N. Y. 211.) By the referee's findings of fact it is conclusively established that the moneys upon which the plaintiff claims interest were loans or advances to and for the use of the firm, and not contributions to the capital. (*Reid v. R. G. Factory*, 3 Cow. 399; 5 Cow. 587; *Gillet v. Van Rensselaer*, 15 N. Y. 397; *Woerz v. Schumacher*, 37 App. Div. 374; *Foley v. Foley*, 15 App. Div. 276; *Chester v. Jumel*, 125 N. Y. 237; *Matter of Norwich Yarn Co.*, 22 Beav. 143; *Troup's Case*, 29 Beav. 353; *Matter of Beulah Park Estate*, L. R. [15 Eq.] 43.) Advances or loans to a partnership by one partner are not like capital, but like borrowing from a third person; interest is allowed thereon the same as on a loan by a third person, and no special agreement or promise to pay interest is required. (*Lloyd v. Carrier*, 2 Lans. 364; *Beach v. Colles*, 85 N. Y. 515; *Collender v. Phelan*, 79 N. Y. 366; *Morris v. Allen*, 14 N. J. Eq. 44; *Hedges v. Parker*, 17 Vt. 242; *Ligare v. Peacock*, 109 Ill. 94; *Matthews v. Adams*, 84 Md. 143; *Matter of G. M. Co.*, 4 De G., M. & G. 19; *Matter of Cleverdon*, 4 Ont. App. 185.) The entire evidence in this case shows conclusively that it would be inequitable and unjust, and contrary to the intention of the parties, not to allow interest. (*Stenton v. Jerome*, 54 N. Y. 484; *Lockwood v. Thorne*, 18 N. Y. 285; *Champion v. Joslyn*, 44 N. Y. 653; *Quincy v. White*, 63 N. Y. 370.)

F. R. Minrath for respondent. As the referee reports in favor of respondent and as the judgment thereon was affirmed by the Appellate Division, both as to the law and the facts, this court will presume each and every finding of fact which may be necessary to support the judgment rendered, except so far as such facts may be inconsistent with findings actually made. (*E. C. F. Co. v. Hersee*, 103 N. Y. 27; *Hoyt v. Hoyt*, 8 Bosw. 521; *Carman v. Pultz*, 21 N. Y. 547; *Grant v. Morse*, 22 N. Y. 323; *Meyer v. Lathrop*, 73 N. Y. 315; *Reitz v. Reitz*, 80 N. Y. 538; *People v. A. Ry. Co.*, 160 N.

Y. 235; *Valentine v. Conner*, 40 N. Y. 254; *Gardiner v. Schwab*, 110 N. Y. 650; *Kellogg v. Thompson*, 66 N. Y. 88.) There is no finding in said report that Rodgers made advances of money to the firm, and what appellant Rodgers claims were advances were really his capital contributions to the firm. (*Powder Co. v. Burkhardt*, 97 U. S. 117; *Ormsby v. Nevada*, 6 Nev. 283; *Harrison v. Wood*, 8 Bing. 371; *Gibbons v. United States*, 1 Dev. 51; *Cooper v. Cooper*, L. R. [8 Ch. App.] 813; *Chase v. Ewing*, 51 Barb. 597; *Nolan v. Bolton*, 25 Ga. 352.) The disallowance of interest was proper because before interest can be allowed in any case it must be by virtue of some contract, expressed or implied, and the actions of the partners under the contract negative the idea that there was any implied contract that interest should be paid. (*Jackson v. Johnson*, 11 Hun, 509; *Snyder v. Seaman*, 2 App. Div. 258; *Lewis v. W. L. Co.*, 14 N. Y. S. R. 302; *Sanford v. Barney*, 50 Hun, 108; *Matter of James*, 146 N. Y. 106; *Matter of N. Y. & B. B.*, 137 N. Y. 95; *Reid v. R. G. Factory*, 3 Cow. 393; *Church v. Kidd*, 3 Hun, 254; *Meech v. Smith*, 7 Wend. 315; *Johnson v. Hartshorne*, 52 N. Y. 173.)

O'BRIEN, J. This was an action for an accounting between partners. In the year 1887 the plaintiff and defendant formed a partnership by agreement, without writing, the purpose of which was to obtain and execute contracts for the construction of public works as might be mutually agreed upon from time to time, the partnership to continue until the contracts procured or taken by the firm had been completed or performed. The profits and losses of the business were to be equally divided between the parties. Under this arrangement the firm procured contracts to construct various public works in this and in other states, which contracts were executed and performed prior to the commencement of this action. This suit was made necessary on account of differences which had arisen with respect to the division of the firm assets and the settlement of the partnership affairs. The cause was tried before a referee, who, after stating the account, found a bal-

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ance due to the defendant, including interest to April 20th, 1896, the date of the report, amounting in the aggregate to \$4,928.66, and judgment was entered accordingly. On appeal by the plaintiff the Appellate Division held that the judgment in defendant's favor was excessive in the sum of \$897.52, and ordered a new trial unless the defendant should stipulate to reduce the judgment by that amount. The stipulation was given, the judgment so modified and the plaintiff appeals to this court.

The appeal presents but a single question and that is the right of the plaintiff to be credited with an item of \$5,997.66, which represents the interest upon certain moneys advanced by him for the use of the firm while it was engaged in the execution of a contract for the construction of a railroad. The referee refused to allow this item and was sustained in this ruling by the court below on appeal. The counsel seem to be in substantial accord with respect to the principles of law applicable to such a question. If the moneys advanced by the plaintiff to the firm were contributions of capital or additions to plaintiff's capital, then he was not entitled to interest on the same, since he must rely upon the profits of the business to compensate him for the investment, unless there was a special agreement between the partners that interest should be allowed. (*Johnson v. Hartshorne*, 52 N. Y. 173; *Jackson v. Johnson*, 11 Hun, 509; *affd.*, 74 N. Y. 607; *Sandford v. Barney*, 50 Hun, 108; *In re James*, 146 N. Y. 106; *Cheever v. Lamar*, 19 Hun, 130; *Stoughton v. Lynch*, 2 Johns. Ch. 209; *Collyer on Part.* § 318; *Lindley on Part.* 389.)

But, on the other hand, if the moneys so paid or advanced by the plaintiff for the use of the firm were in fact loans, and the plaintiff as to such advances was a creditor of the firm, he stands upon the same footing as any other creditor with respect to the right to be allowed interest upon the accounting. A partner may loan money to the firm of which he is a member, and when he does his right to interest is to be determined in the same way as that of any other creditor. In such cases the general rule is to allow interest upon the advances, although

there was no express agreement by the firm to pay it, in the absence of some agreement to the contrary, express or implied. The right to interest, or an agreement to pay or allow it, is to be implied in such cases without any express promise, as in like transactions between parties holding no partnership relations to each other. (*Reid v. Van Rensselaer Glass Factory*, 3 Cowen, 399, 436, 437; *affd.*, 5 Cowen, 587; *Liotard v. Graves*, 3 Caines, 243; *Gillet v. Van Rensselaer*, 15 N. Y. 397; *Foley v. Foley*, 15 App. Div. 276; *Chester v. Jumel*, 125 N. Y. 237; *Lloyd v. Carrier*, 2 Lans. 364; *Beach v. Colles*, 85 N. Y. 515; *Colender v. Phelan*, 79 N. Y. 366; *Morris v. Allen*, 14 N. J. Eq. 44; *Baker v. Mayo*, 129 Mass. 517; *In re German Mining Co.*, 4 DeG., M. & G. 19, 35; 1 Lindley on Part. 390; *In re Norwich Yarn Co.*, 22 Beav. 143, 168; *Troup's Case*, 29 Beav. 353; *In re Beulah Park Estate*, L. R. [15 Eq.] 43; *Hodges v. Parker*, 17 Vt. 242; *Ligare v. Peacock*, 109 Ill. 94; *Matthews v. Adams*, 84 Md. 143; *Woerz v. Schumacher*, 161 N. Y. 530.)

When the money has been paid in as capital, or where there is an express agreement between the parties that interest is not to be allowed or charged, this rule, of course, has no application. So the plaintiff's right to the item of interest must depend upon the fact that the money was a loan to the firm and not a contribution to capital, and we must resort to the findings of the referee for the fact. The only finding in the report that bears upon the question is in the following words: "The claim made by plaintiff for interest on his advances of money to and for the use of the firm is disallowed, for the reason that, as a matter of fact, there was no agreement, either express or implied, that such interest should be paid or allowed, and, under the circumstances of the case, the right to interest does not exist as matter of law in the absence of such an agreement." It is not quite clear whether this language was used by the learned referee to express the idea of a loan or a contribution to capital although the words "advances of money to and for the use of the firm" are more appropriate to describe a loan than a payment of capital. (*Snyder v.*

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Lindsey, 157 N. Y. 616.) While the language is open to construction, it would be quite unreasonable to hold that it imports a finding that the money advanced was capital and not a loan to the firm. It is claimed by the learned counsel for the defendant that the decision upon the appeal below conclusively establishes the fact, so far as this court is concerned, that the money advanced was capital and not a loan. The court upon appeal could not settle that fact unless it had been found by the trial court, and the referee did not, in terms at least, make any such finding. The order of the learned court below is in the following words: "It is hereby ordered and adjudged that the judgment so appealed from be, and the same is, hereby reversed and a new trial granted, costs to abide the event, unless within twenty days defendant stipulates to reduce his recovery by deducting therefrom \$897.52, in which event the judgment so reduced is affirmed, without costs, and in such case the court unanimously decided that the findings of fact as modified, as aforesaid, are supported by the evidence." We do not perceive how this order can conclude the plaintiff in this court upon the question of interest since that question is one of law arising upon the facts found. The inquiry now is what has the referee found? Has he found that the money advanced was capital, or has he found that it was a loan? On this vital question the order of the learned court below reflects no light. But it is said that this court must in such a case as this presume that the referee found every fact necessary to support the judgment, although such fact is not expressly stated in the report. That proposition is doubtless correct, providing the necessary finding was within the scope of the pleadings and the evidence. (*Amherst College v. Ritch*, 151 N. Y. 282.) But we are not required to presume that the referee found facts against the evidence or against the admissions of the pleadings, and in order to give construction to the language of the referee in the finding referred to, we may properly look into the pleadings in order to see what was the attitude of the parties at the trial. Not only is the answer silent with respect to any claim by the defendant that

the advances were capital, but under a fair construction the fact that they were loans seems to be admitted. The complaint distinctly alleged "that the plaintiff has, at various times, loaned to the said copartnership large sums of money, which have not yet been repaid." This allegation cannot fairly be limited to any particular advance or transaction, but is broad enough to include all advances made by the plaintiff to the firm during the existence of the partnership, and it is stated that these advances were *loans*. If the fact thus alleged has not been controverted, it must be taken as admitted. The answer of the defendant to this allegation is as follows: "The defendant denies the allegations of the seventh paragraph of the complaint, but admits that the plaintiff did loan to the said copartnership certain sums of money, all of which were repaid to him." It will be seen that this allegation of the answer contains a denial, an admission and an affirmative averment. It is a settled rule in the construction of pleadings that a material fact distinctly alleged in the complaint is not controverted by stating the same fact in the answer in some other way or by giving a version of the transaction inconsistent with the allegation in the complaint. The allegations of the complaint are controverted or put in issue only by a general or specific denial. A material fact alleged is not controverted or put in issue by a statement inconsistent with the facts, or from which a denial may be implied or inferred. (*Fleischman v. Stein*, 90 N. Y. 110; *Marston v. Swett*, 66 N. Y. 210; *Wood v. Whiting*, 21 Barb. 190; *West v. American Exchange Bank*, 44 Barb. 175.) The material fact alleged in the complaint in this case was that the plaintiff had made loans of money to the firm. This allegation was not met by either a general or specific denial, but by a statement in a single sentence, which, when properly interpreted, amounts to an affirmative plea of payment. The pleader first denies the allegations of the complaint, then admits them and alleges that the loans were paid.

The findings of the learned referee, when read with the pleadings, should, therefore, be construed as importing a loan

to the firm and not a contribution to capital. If the words "advances of money to and for the use of the firm" are in themselves ambiguous, they are made quite certain by the condition of the pleadings, and, hence, it is reasonable to conclude that the referee did not find that the money advanced was capital, but did find that it was a loan to the firm. The real character of the various transactions having thus been established, as matter of fact, by the findings, nothing remains but to apply the law to the fact found. We think that the refusal of the referee to allow interest to the plaintiff on the sums loaned by him to the firm was error, and the judgment must, therefore, be reversed and a new trial granted, costs to abide the final award of costs in the action.

PARKER, Ch. J., HAIGHT and WERNER, JJ., concur; GRAY and LANDON, JJ., dissent; CULLEN, J., not sitting.

Judgment reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE STATE BOARD OF CHARITIES, Respondent, v. THE NEW YORK SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, Appellant.

1. CONSTITUTIONAL LAW — CORPORATIONS, WHEN CHARITABLE. A charitable institution, within the meaning of sections 11 to 14 of article 8 of the Constitution, chapter 771 of the Laws of 1895, and chapter 546 of the Laws of 1896, giving to the state board of charities the right of visitation with respect to all charitable institutions, is one that in some form or to some extent receives public money for the support and maintenance of indigent persons, and by public money is meant money raised by taxation not only in the state at large, but in any city, county or town.

2. PRIVATE CHARITABLE INSTITUTION NOT SUBJECT TO STATE INSPECTION. A purely private institution, which, without any compensation from the public, cares for or maintains indigent adults or children who voluntarily seek it as a home, or who remain there voluntarily, is not subject to state inspection or regulation.

(Submitted March 12, 1900; decided April 17, 1900.)

MOTION for reargument of case reported in volume 161, New York Reports, at page 233.

John C. Davies, Attorney-General, Theodore E. Hancock, Benjamin F. Tracy and John M. Bowers for motion.

David B. Hill and De Lancey Nicoll opposed.

O'BRIEN, J. The counsel for the respective parties in this case have submitted voluminous papers and elaborate briefs in support of, and in opposition to, a motion for a re-argument. In the notice of motion, numerous grounds for a rehearing are to be found, but only one of them need be considered. That is, that the court, in the decision of the case, has overlooked certain constitutional and statutory provisions relating to the visitorial power of the board of charities, through the inadvertence of counsel. Upon this ground, substantially every feature of the case has been presented for the second time. On many of the points the prevailing opinion of this court is quoted, not to show that the particular point was overlooked, but that our conclusion was wrong in point of law. The whole discussion resolves itself, in the end, into the inquiry : what is a charitable institution within the meaning of the Constitution and the statutes. When that term, as used in the Constitution, is defined, the controversy is settled, since the statutes are no broader than the Constitution, and whatever construction is to be placed upon the fundamental law, the same construction would follow with respect to the same terms when used in the statute. The brief upon this motion is signed by the attorney-general and his predecessor in office, who appeared as counsel in the case, and also by two other distinguished members of the bar who did not participate in the original argument. It is somewhat remarkable that in all the discussion upon the only question in the case the counsel have not attempted to furnish a definition of a charitable institution, as that term is used in the Constitution. All must admit that it does not include every corporation or society that has some charitable feature or is engaged in some good work, but that the meaning of those terms must be limited. This much, it is safe to premise, has already been demonstrated and

must be conceded. Assuming that this proposition is beyond dispute, the question is, and always has been, where is the line to be drawn? The learned counsel who have presented the brief in support of this motion have not attempted to draw it. It is true that they earnestly contend that this court, in the decision of the case, has drawn the line at the wrong point, but they have not attempted to inform us at what other point it should be placed. They evidently have contented themselves with attempting to show that wherever it is drawn this defendant should be included within the powers of the board of charities.

It is quite obvious, however, that if any limitations at all are to be placed upon those powers the language of the Constitution must be construed by some reasonable rule or upon some rational principle. We have attempted to do that by holding that a charitable institution must be one that in some form or to some extent receives public money for the support and maintenance of indigent persons. By public money is meant money raised by taxation not only in the state at large but in any city, county or town. The adoption of this principle will permit the board to visit, inspect and regulate every institution in the state, public or private, where children or adults are supported or maintained, in whole or in part, by the use of public money, and every institution, public or private, where children or adults are sent or detained for support or maintenance in pursuance of any law. But we are informed by the papers upon this motion that this rule would deprive the board of jurisdiction over half the charitable institutions in the state. The papers presented in opposition to this motion show that the institutions thus excluded, with the exception, perhaps, of about half a dozen, have never been visited by the board in the past; and obviously, if it be true, as the relator asserts, that there are over twelve hundred charitable institutions in the state, it would be impossible to exercise the power of visitation by the board with respect to all of them in any one year. There must, in the nature of things, be a distinction in this respect between private institu-

tions receiving public money in some form or in some measure as charity and the same class of institutions that do not. This may be illustrated by reference to a class of institutions mentioned in the moving papers. We will suppose that a private individual is wealthy and benevolent enough to found and endow a private hospital. When complete the building and everything in it is his private property. No one is compelled by any law to go there or remain there, and the founder is under no legal obligation to receive patients. It is purely a private concern, and it is difficult to understand upon what legal ground the state can claim the right to inspect his books, or to make rules and regulations for the transaction of the business. There must be some limit to the power of government to interfere in purely private affairs; and what is true of a hospital is equally true of many of the other private institutions referred to in the moving papers. But when any of these institutions become, in any form or to any extent, the recipients or beneficiaries of public money as charity, there is a just and reasonable ground upon which the state may claim the right of visitation. And it is by the application of this principle that a charitable institution, as used in the Constitution, is to be defined and understood.

It was upon this principle that the decision in this case attempted to define what is and what is not a charitable institution. We are satisfied, upon further examination of the case, that the rule adopted is not only just and reasonable in itself, but it was the principle which the convention intended to engraft upon the Constitution, and this really presents the only disputed question of law in this case. The learned counsel for the relator do not assent to this construction. Their position to the contrary is distinctly stated in the moving papers in these words: "The main purpose and intention of the constitutional provisions and the statutory enactment are not so much to supervise the pecuniary affairs of institutions as to provide for an inspection of the management of the institutions and to see that the inmates are properly treated, and, if not, so to secure the correction through due process of

law of whatever abuses, evils or defects which may be found to exist." It is not very easy to see how the state can examine into the evils or correct the abuses in a purely private unincorporated institution to which no one could be sent, or in which no one can be detained by any law, and where the inmates may come and go at pleasure. If the framers of the Constitution had any such purpose in mind it is remarkable that no trace of it is to be found and no reference was made to it in the proceedings and debates upon those provisions of the Constitution relating to charities. The proceedings of the convention do not disclose any purpose to interfere with private institutions that were not in any form, or to any extent, the beneficiaries of public money. I refer, of course, to those private institutions that admit or care for children or adults without any compensation from the public and where the inmates are in the institution solely by their own volition. If the inmates in these institutions are not properly treated they are not obliged to stay there or to go there. If they are detained there against their will the process of the courts is open to them to secure their enlargement or liberation. If a mere private institution is not properly managed in the opinion of the board of charities it would be difficult, I think, to point out any law which confers power upon the board to change the management. It is safe for the courts to assume that such institutions, depending on the patronage of the public, will be interested to merit it by such a management of their affairs as will commend them to the confidence of their patrons, and that if they fail to treat the inmates properly they will not go there voluntarily or remain when there. The perfect liberty of action which the inmates enjoy, and the promptings of self-interest on both sides, will regulate private charity without any governmental interference. There is nothing in the proceedings of the convention to warrant us in holding that there was any purpose to subject purely private institutions which cared for or maintained those indigent adults or children who voluntarily seek such places as homes or remain there voluntarily to state inspection or regu-

lation. The purpose which the learned counsel for the relator now claim was in the mind of the convention is nowhere expressed in the proceedings of that body, and there was no public demand for any change in that respect.

On the contrary, the purpose of regulating the expenditure of public money for charity was stated and avowed by nearly every member that spoke on that subject, and in all the written records of that body. The article of the Constitution now under consideration was reported from the committee on charities by the chairman, Mr. Lauterbach, on the 2d of August, 1894. It was accompanied by an elaborate report in writing, and it is only necessary to read it in order to ascertain the underlying purpose in view. When the convention was about to adjourn on the 29th of September, 1894, the president, Mr. Choate, delivered an address, which was evidently the result of reflection, if not of careful preparation. On the subject now under consideration he said: "There was another subject which deeply agitated the minds of the people of this state, and that was the application of public money in the way of private charity. By many who had not carefully examined the subject it was believed to be inherently an evil which could only be cured by cutting it out by the roots. We have, through our charities committee, most carefully examined that question, and I think we came to the conclusion that the system which the state had deliberately adopted and carefully followed now for more than twenty years, of employing the aid of honest, faithful, devoted private charitable institutions for the care of certain wards of the state that could not otherwise be as well cared for, ought not to be departed from; but, at the same time, there were abuses incident to the conduct of that mode of charity which at least there should be a stop put to, and we have deprived the legislature of the compulsory power in the matter. Hereafter, if this constitution is adopted, no subordinate division of the state can be compelled, by the central power of the state, to devote a dollar of its money, against its will, to any particular form of charity. Besides that we have secured the regulation of the state board

of charities to this effect: that wherever any public money is devoted to a private charity for the public service it shall continue under public control, and the vigilant eye and the strong arm of the people shall be able to follow every dollar of the public money into every institution to which it is so devoted."

Before the adjournment, the convention appointed a committee to prepare a public address to the people in order to inform them before the election with respect to the purpose and scope of the changes made in the fundamental law. That committee was composed of some of the most prominent members of the convention, including the president. The question of charities was referred to in this address in the following language:

"We have required the legislature to provide for free public schools in which all of the children of the state may be educated; and we have prohibited absolutely the use of public money in aid of sectarian schools. We have provided also for regulating and limiting the payment of public money to private institutions for the support of the poor by depriving the legislature of the power to pass mandatory laws requiring such payments from counties, cities, towns and villages, and by subjecting such expenditures to the control of the State Board of Charities."

These statements from the highest and most authoritative sources indicate very clearly what the purpose of the convention was, and in the light of that purpose we may safely interpret the meaning of the language employed. The purpose was to safeguard the expenditure of public money for the support and maintenance of indigent persons in public or private institutions; and hence the language employed should be made subservient to that purpose. It is reasonable, therefore, to conclude that when the framers of the Constitution spoke of charitable institutions they intended to designate only such as were within the scope of the reform. So long as we give effect to the Constitution, according to the spirit and purpose in which it was framed by the convention and

adopted by the people, it is safe to conclude that the decision rests on reasonable grounds.

There is no distinction, we think, between a charitable institution and an eleemosynary one. The two words are used interchangeably and express substantially the same idea. Nor do we think that the suggestion that the defendant, if not a charitable institution, is a reformatory or a correctional one, has any substantial foundation. The defendant is not a correctional or a reformatory institution, unless, indeed, in the same sense that the police department or the police courts are. Much emphasis is placed upon the circumstance that the defendant, under a special statute, may be appointed guardian of a minor child. We assume that many trust companies and other corporations have been given the like capacity, but the fact that they possess such power does not prove or tend to prove that they are charitable institutions. It is said that this case is of great public importance, and in view of this suggestion we have carefully considered all that has been submitted in support of the motion, but we see no reason to change our views with respect to the proper decision of the case.

The motion for a reargument should, therefore, be denied, with ten dollars costs.

PARKER, Ch. J., GRAY and BARTLETT, JJ., concur; HAIGHT, MARTIN and VANN, JJ., dissent from opinion, but concur in result upon the ground that there is no reason for a reargument.

Motion denied.

In the Matter of the Application of LAURA LEGGAT, Appellant, to Punish WILLIAM V. MOLLOY, Sheriff of Westchester County, Respondent, for Contempt of Court.

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f163	597

HABEAS CORPUS—LIABILITY OF SHERIFF FOR DISCHARGE OF CIVIL DEBTOR FROM IMPRISONMENT—CODE CIV. PRO. § 2088, SUBD. 1. A county judge has no power, upon the return to a writ of habeas corpus, to order the discharge of an executrix, committed to jail for a civil contempt in failing to pay certain sums of money to persons named in a surrogate's decree, where no notice has been given to the persons who have an interest in continuing the imprisonment or restraint, or to their attorney; such an order is void under subdivision 1 of section 2088 of the Code of Civil Procedure, and affords no protection to a sheriff, in a proceeding to punish him for a civil contempt in releasing her from custody, because made by an officer of limited statutory jurisdiction without taking the necessary jurisdictional steps, if the order contains no recital of jurisdictional facts and the sheriff cannot prove such facts by extrinsic evidence. *Matter of Leggat*, 47 App. Div. 381, reversed.

(Argued February 27, 1900; decided April 17, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, made January 9, 1900, reversing an order of the Surrogate's Court of Westchester county adjudging William V. Molloy, sheriff of said county, guilty of a civil contempt of court and imposing a fine upon him of \$250, for that he discharged from the county jail of said county Susie Slater Weeks, committed thereto by the mandate and commitment of said Surrogate's Court until she should make payment according to said mandate, without receiving such payment, and dismissing the proceedings.

The facts, so far as material, are stated in the opinion.

Jacob Marks for appellant. The County Court had no jurisdiction to make a final order in habeas corpus proceedings discharging the prisoner, in the absence of a return, and notice to the party who had an interest in continuing the imprisonment of the time and place where the writ was returnable.

The failure to comply with the provisions of the Code in this respect was a jurisdictional defect, and makes the order of the County Court absolutely void. (Church on Habeas Corpus, §§ 105, 120, 123; *People ex rel. v. Brennan*, 61 Barb. 540; *People ex rel. v. Moss*, 6 App. Div. 417; *People v. Cassels*, 5 Hill, 167; *People v. Pelham*, 14 Wend. 48; *People ex rel. v. Frink*, 41 Hun, 188; *People v. Walsh*, 21 Abb. [N. C.] 299; *People ex rel. v. Grant*, 111 N. Y. 584; *People ex rel. v. Warden, etc.*, 100 N. Y. 20; *People ex rel. v. Mercein*, 8 Paige, 47; *People ex rel. v. Leubischer*, 34 App. Div. 577.) The order of the county judge directing the discharge of the prisoner is void, and affords no protection to the sheriff, as there are no recitals in it that the statutory requirements necessary to confer jurisdiction had been taken, and as no proof was or could be given by the sheriff *aliunde* the order that these requirements had been taken. (*Bullymore v. Cooper*, 46 N. Y. 236; *Shaffer v. Riseley*, 114 N. Y. 23; *Seward v. Wales*, 40 App. Div. 539; *Cable v. Cooper*, 15 Johns. 152; *Jackson v. Smith*, 5 Johns. 115; Murfree on Sheriffs, § 203; Crocker on Sheriffs, § 605.) The sheriff violated every requirement of the Code regulating the discharge of a person in his custody by habeas corpus proceedings. His acts and knowledge of the irregularity of his proceedings constituted a contempt of court in disobeying the surrogate's commitment which directed him to keep the prisoner in jail until discharged according to law. (Code Civ. Pro. § 14, subd. 1; *People v. Stone*, 10 Paige, 606; *Matter of Clark*, 20 Hun, 551; *People ex rel. v. Ct. of Oyer & Terminer*, 10 App. Div. 26; *Mayor, etc., v. Pendleton*, 64 N. Y. 622; *King v. Barnes*, 113 N. Y. 476; *People ex rel. v. Ct. of Oyer & Terminer*, 101 N. Y. 245; *Jewelers' Agency v. Rothschild*, 6 App. Div. 500; *Clark v. Bininger*, 75 N. Y. 344; *People ex rel. v. McKane*, 78 Hun, 154; *People v. Walsh*, 21 Abb. [N. C.] 299.)

Justus A. B. Cowles and *Charles P. Cowles* for respondent. A ministerial officer is protected in the execution of a

process whether the same issue from a court of limited or general jurisdiction, although such court has not in fact such jurisdiction in the case, provided it appears that the court has jurisdiction of the subject-matter and nothing appears in the process to apprise the officer but that the court also has jurisdiction of the person of the party to be affected by the process. (*Savacool v. Boughton*, 5 Wend. 170; *Chegaray v. Jenkins*, 5 N. Y. 376.) A process, though void as respects the party, if regular and apparently valid on its face, will protect the officer. (*Kerr v. Mount*, 28 N. Y. 659; *Roderigas v. E. R. S. Inst.*, 76 N. Y. 316.) The county judge had jurisdiction to entertain the application for the writ of habeas corpus. (Code Civ. Pro. §§ 241, 2017, 2020.) The county judge in open court ordered the prisoner's discharge, and an order of discharge was duly entered. This was within his judicial powers, and it was the sheriff's duty to obey his command. (*People ex rel. v. Sturtevant*, 9 N. Y. 263; *People ex rel. v. Van Buren*, 136 N. Y. 252; *People ex rel. v. McKane*, 78 Hun, 154; *People ex rel. v. Rice*, 144 N. Y. 249; *Ketchum v. Edwards*, 153 N. Y. 534; *Washbon v. Cope*, 144 N. Y. 287; *O'Connor v. Felix*, 87 Hun, 179.) If no notice was given, such failure constituted only an irregularity and it was by no means a jurisdictional defect. (*Arkenburgh v. Arkenburgh*, 14 App. Div. 367; *Spiehler v. Asiel*, 83 Hun, 223; *Kelly v. West*, 80 N. Y. 139; *People ex rel. v. Frink*, 41 Hun, 188; *Develin v. Cooper*, 84 N. Y. 410.)

LANDON, J. We assume that the sheriff, notwithstanding the informality of his proceedings in obedience to the command of the writ of habeas corpus issued to him by the county judge of Westchester county, produced the body of Susie Slater Weeks before the judge, and made return thereto that he held her in custody by virtue of the order of the Surrogate's Court of that county, and a commitment entered by the said Surrogate's Court upon that order and issued to the sheriff, whereby he was commanded to take the body of Mrs. Weeks and commit her to the common jail of his county, and

keep and detain her therein under his custody until she should have fully paid the sum of \$935.53 and his fees thereon, or until she be discharged according to law.

The order and the commitment recited that in certain proceedings in the said Surrogate's Court of Westchester county, entitled "In the Matter of the Judicial Settlement of the Account of Susie Slater Weeks, Executrix of the Last Will and Testament of Loretta Slater, Deceased," Susie Slater Weeks had been directed to pay to the persons therein named certain sums of money aggregating \$935.53, and that such proceedings had been duly had in said Surrogate's Court as resulted in that court adjudging her guilty of a civil contempt of court for disobedience of the order.

In the body of the commitment, and also indorsed thereon, were the names, among others, of Laura Leggat, this petitioner, and of her attorney, Jacob Marks, with his office address, also the names of the other parties to whom payment was directed to be made, and of their attorneys.

The county judge, upon the production of Mrs. Weeks before him with the order and commitment, and on motion of her attorney and without notice to any of the persons or their attorneys for whose benefit the surrogate had committed Mrs. Weeks, indorsed upon the certified copy of commitment: "Discharged May 31, 1899, SMITH LENT, County Judge," and thereupon the sheriff discharged her.

The next day the county judge signed a formal order which recited the production before him by the sheriff of the body of Susie Slater Weeks and the presentation to him by the sheriff of the order and commitment of the Surrogate's Court, and then proceeded: "The county judge having examined the said commitment and order so presented by the sheriff, in response to said writ, and finding the same void upon the face, now, on motion of David H. Hunt, of counsel for relator, it is ordered that said relator, Susie Slater Weeks, be forthwith discharged."

In subsequent proceedings in the Surrogate's Court, instituted by the petitioner herein, that court adjudged the sheriff

guilty of a civil contempt in releasing Mrs. Weeks, and imposed a fine of \$250 upon him. The Appellate Division unanimously reversed the order of the Surrogate's Court.

The order of the county judge was in direct conflict with section 2038 of the Code of Civil Procedure, which provides: "Where it appears, from the return to either writ, that the prisoner is in custody by virtue of a mandate, an order for his discharge shall not be made, until notice of the time when, and the place where, the writ is returnable, or to which the hearing has been adjourned, as the case may be, has been either personally served, eight days previously, or given in such other manner, and for such previous length of time, as the court or judge prescribes, as follows:

"1. Where the mandate was issued or made in a civil action or special proceeding, to the person who has an interest in continuing the imprisonment or restraint, or his attorney."

It is said that the county judge had jurisdiction of the person and of the subject-matter, and that if he thereafter disobeyed the statute it was but an irregularity or error to be corrected by appeal.

The proposition will not stand the test of examination. While the writ of habeas corpus to inquire into the cause of detention is of great antiquity, and the privilege of the writ is protected from suspension by the National and State Constitutions, nevertheless, since the Revised Statutes, the law respecting it has been statutory in form. The revisers remark in their notes "that the law in relation to it should be brought into one general institution." The idea was that the law should be precisely stated, and not exposed to the differing views and modes of expression of different judges. This court said in *People ex rel. Tweed v. Liscomb* (60 N. Y. 559) that the provisions of the Revised Statutes were in full accord with the common law. The sections of the Code of Civil Procedure relating to the writ are a re-revision of the provisions of the Revised Statutes in harmony with a supposed more scientific method of expression and with some adjudications.

The judge before whom the prisoner is brought is not a law to himself; he finds the law already written. While section 2031 provides that the judge or court "must, immediately after the return of the writ, examine into the facts alleged in the return, and into the cause of the imprisonment or restraint of the prisoner; and must make a final order to discharge him therefrom, if no lawful cause for the imprisonment or restraint or for the continuance thereof, is shown," still the section 2032 immediately following points out the cases in which the court or judge shall forthwith make a final order to remand the prisoner, and section 2033 provides: "If it appears upon the return, that the prisoner is in custody, by virtue of a mandate in a civil cause, he can be discharged, only in one of the following cases," and then it mentions six cases, but the section does not declare or imply that the judge or court can make an *ex parte* order directing the discharge of the prisoner. Section 2038 plainly forbids it.

It is obvious if the judge or court, upon examining into the facts and cause of imprisonment alleged in the return under section 2031, discovers that the imprisonment is "by virtue of a mandate in a civil cause," as specified in section 2033, that he can make no order for the discharge of the prisoner upon any one of the six grounds specified in such section until the proper notice under section 2038 has been given to the parties in whose favor the mandate was made.

By whatever name called, the subject-matter embraced the right of the parties who had procured Mrs. Weeks' imprisonment to have it continued until she should make the payments directed by the Surrogate's Court. That right was a private right. (*People ex rel. Munsell v. Court of Oyer and Terminer*, 101 N. Y. 245.) By section 2038, which follows the spirit of the Constitution, Mrs. Leggat and the other persons benefited by it could not be deprived of it without due process of law, the essential element of which is notice, and, until notice was given to them, the county judge had no complete jurisdiction of them or of the subject-matter.

It is obvious that Mrs. Weeks, in procuring the writ of

habeas corpus, sued to have her liberty adjudged as against the only persons who had an interest to deprive her of it. If she had been in confinement for an alleged crime, the issue, if any, would have been between her and the state. Although in such case section 2038 requires that notice be given to the district attorney, it may be that the only object of that notice is to provide that the judge or court shall have the benefit of whatever information that officer can furnish, not as a condition precedent to full jurisdiction, but as an aid to the proper exercise of it; and, therefore, if the judge or court chooses to proceed without it, it is at best a mere irregularity, the judge or court being at once the full arbiter of both the right of the prisoner and of the state. We do not decide that this is so—there are cases to the effect that it is not so (*People v. Cassels*, 5 Hill, 167; *People v. Carter*, 48 Hun, 165)—but we refer to such a case to point out more clearly the situation in a civil case between private parties when, by a writ of habeas corpus, the prisoner seeks to have it adjudged against the persons who have procured his imprisonment that they have no right to the remedy or no right to continue it longer.

The judge cannot decide the question as to the prisoner without also deciding it as to the adverse parties in interest; and, until they have had notice, neither they nor their part of the subject-matter has been brought within his jurisdiction. (*People ex rel. Hewlett v. Brennan*, 61 Barb. 540; *People v. Pelham*, 14 Wend. 48; *Ex parte Beatty*, 12 Wend. 229.) Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to a suit. (*People ex rel. Davis v. Sturtevant*, 9 N. Y. 263.) Where there is a controversy between adverse parties, both have an equal right to be heard, and to secure to them this right notice of the time and place of hearing is necessary, and, hence, section 2038. Jurisdiction, it was said in *Develin v. Cooper* (84 N. Y. 410), a case of an insolvent's discharge, consists of three things: *First*, power by law to act upon the general subject-matter; *second*, jurisdiction of the person of the particular insolvent; *third*, jurisdiction of the particular case. It is obvious that

unless notice should be given to the adverse parties the third requirement would be lacking.

It is said that the parties aggrieved may proceed to have the order of the county judge vacated. If they should succeed in such an effort it does not appear that they could then find Mrs. Weeks within the state. Whatever they may do to retrieve their lost advantage concedes the loss.

As the order of the county judge was void because made without taking jurisdictional steps enough to complete his jurisdiction to make it, it afforded no protection to the sheriff, because it was made by an officer of limited statutory jurisdiction; it contained no recital of jurisdictional facts, and it was in the nature of the case impossible for the sheriff to prove such facts by extrinsic evidence. He could neither show nor prove regular process, and it was necessary for him to do one or the other. (*Bullymore v. Cooper*, 46 N. Y. 241; *Shaffer v. Riseley*, 114 N. Y. 23.)

The order of the Appellate Division should be reversed and that of the surrogate affirmed, with costs.

PARKER, Ch. J., O'BRIEN and BARTLETT, JJ., concur; HAIGHT, MARTIN and VANN, JJ., dissent.

Order reversed, etc.

DAVID SCHRYER, Appellant, v. THEODOCIUS FENTON,
Respondent.

APPEAL—REVIEW OF JUDGMENT ENTERED UPON A SPECIAL VERDICT. Section 1838 of the Code of Civil Procedure has no application to a judgment entered upon a verdict, and the Court of Appeals has no jurisdiction to review an order of the Appellate Division reversing a judgment entered upon a special verdict and granting a new trial, when it does not appear that the facts as found by the verdict were affirmed or approved by the Appellate Division.

Schryer v. Fenton, 15 App. Div. 158, appeal dismissed.

(Argued March 1, 1900; decided April 17, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered

162	444
f164	877
162	444
168	471

N. Y. Rep.]

Opinion of the Court, per HAIGHT, J.

March 9, 1897, reversing a judgment in favor of plaintiff entered upon a verdict and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

John P. Kellas for appellant. This appeal being from a judgment reversing a judgment entered upon a determination of the trial court and an order granting a new trial upon such reversal, it must be presumed that the judgment was not reversed and a new trial granted upon a question of fact, but that the reversal was wholly upon errors of law, and that the facts found by the trial court stand approved by the Appellate Division. (Code Civ. Pro. § 1338; *Bomeisler v. Forster*, 154 N. Y. 229; *Petrie v. Trustees of Hamilton College*, 158 N. Y. 458; *People v. A. R. Co.*, 160 N. Y. 225; *Gannon v. McGuire*, 160 N. Y. 476; *Lannon v. Lynch*, 160 N. Y. 483.)

John P. Badger for respondent.

HAIGHT, J. This action was brought for the wrongful conversion of a quantity of hay. The defendant justified under an execution issued upon a judgment in favor of Stevens and Porter against John S. Martin and James Danford, which was issued to him as constable, and upon which the levy and sale complained of were made. Upon the trial at Circuit there was a special verdict found, upon which judgment was entered in favor of the plaintiff, which has been reversed by the Appellate Division and a new trial granted. Section 1338 of the Code of Civil Procedure has reference to judgments entered upon the report of a referee or the decision of a court and has no application to a judgment entered upon a verdict. (*Henavie v. N. Y. C. & H. R. R. Co.*, 154 N. Y. 278.) After the verdict the defendant moved for a new trial upon the ground that the verdict was against the evidence. This motion was denied and an exception taken. The Appellate Division has neglected to state whether the reversal was upon

the law or upon the facts. It does not appear that the facts, as found by the verdict, were affirmed or approved by the court. The reversal may have been upon the ground that the verdict was against the weight of the evidence. It consequently follows that this court has no jurisdiction to review the order appealed from. (*Harris v. Burdett*, 73 N. Y. 136; *Snebley v. Conner*, 78 N. Y. 218; *Chapman v. Comstock*, 134 N. Y. 509; *Mickee v. W. M. & R. M. Co.*, 144 N. Y. 613; *Hoes v. Edison G. E. Co.*, 150 N. Y. 87.)

The appeal should be dismissed, with costs.

PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN and VANN, JJ., concur; LONDON, J., not sitting.

Appeal dismissed.

JOHN VAN DOLSEN, Appellant, v. THE BOARD OF EDUCATION
OF THE CITY OF NEW YORK, Respondent.

NEW YORK CITY — FAILURE OF BOARD OF EDUCATION TO APPROPRIATE MONEY FOR CONTRACT FOR SCHOOL REPAIRS. The failure of the board of education of the city of New York to make an appropriation, authorized and permitted by the provisions of the Consolidation Act (L. 1882, ch. 410), to pay a contractor for erecting a retaining wall for a public school building, under a contract approved and ratified by the board, does not invalidate such contract and preclude a recovery by the contractor where he performed the work in good faith, without knowledge that the appropriation had not been made, and he had no means, under the statute, of protecting himself against the board's exhausting appropriations available and sufficient, at the time the contract was made, to pay for the work.

Van Dolsen v. Bd. of Education, 29 App. Div. 501, reversed.

(Submitted March 1, 1900; decided April 17, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 27, 1898, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term, a jury having been waived.

The nature of the action and the facts, so far as material, are stated in the opinion.

Andrew D. Parker for appellant. The action is properly brought against the board of education, and it alone is liable under plaintiff's contract, and the corporation of the city of New York was not liable to the plaintiff upon his claim. (L. 1882, ch. 410, §§ 1022, 1027, subd. 14; *Dannat v. Mayor, etc.*, 66 N. Y. 585; *Dovovan v. Bd. of Education*, 85 N. Y. 117; *Dannat v. Mayor, etc.*, 6 Hun, 88; *Miller v. Mayor, etc.*, 3 Hun, 35; *Gildersleeve v. Bd. of Education*, 17 Abb. Pr. 201; *Coulter v. Bd. of Education*, 63 N. Y. 365; *Ham v. Mayor, etc.*, 70 N. Y. 459; *Trustees of Union College v. Coughlin*, 89 Hun, 171; *People ex rel. v. Roosevelt*, 24 App. Div. 17.) A sufficient fund, duly appropriated for the use of the board of education, out of which the claim of the plaintiff could be paid, being in existence at the very time the contract made with the plaintiff was entered into, the defendant is liable, even if such appropriation subsequently became exhausted by the action of the board. (*Bird v. Mayor, etc.*, 33 Hun, 396; *Smith v. Mayor, etc.*, 5 Hun, 237; *Cooke v. Saratoga Springs*, 23 Hun, 55; *People ex rel. v. Comptroller*, 77 N. Y. 45.) Defendant was bound to prove affirmatively not only that the specific appropriation for the repairs of buildings had been exhausted, but that no other appropriation for the use of the board of education could be used by transfer, under the authority of the board of estimate and apportionment, for the payment of plaintiff's claim. (*Nelson v. Mayor, etc.*, 63 N. Y. 544; *Reilly v. City of Albany*, 112 N. Y. 30.) The board of education, being duly authorized in law to make the contract with the plaintiff, and the plaintiff having fully performed upon his part, and the defendant having had the full benefit of his work, is liable for its value. (*Kramrath v. City of Albany*, 127 N. Y. 575; *P. J. W. Co. v. Vil. of Port Jervis*, 71 Hun, 66; *Poillon v. City of Brooklyn*, 101 N. Y. 132.)

John Whalen, Corporation Counsel (*Theodore Connolly* of counsel), for respondent. The complaint was properly dismissed. (*Thomas v. Railroad Co.*, 101 U. S. 71; 1 Dillon on

Mun. Corp. 457; *Davis v. Railroad Co.*, 131 Mass. 259; *Donovan v. Mayor, etc.*, 33 N. Y. 291; *McDonald v. Mayor, etc.*, 68 N. Y. 23; *Bank of U. S. v. Dandridge*, 12 Wheat. 64; *Parr v. Vil. of Greenbush*, 72 N. Y. 465; *Waltcn v. Mayor, etc.*, 26 App. Div. 76; *Brady v. Mayor, etc.*, 16 How. Pr. 432; *Kingsland v. Mayor, etc.*, 5 Daly, 448.) The resolutions of the board of education recommending and applying for the transfer of appropriations and approving the report of the committee on buildings recommending payment of the plaintiff's claim, did not render the defendant liable to pay the claim of the plaintiff. (L. 1882, ch. 410, §§ 46, 47; 1 Dillon on Mun. Corp. 453; *Hodges v. City of Buffalo*, 2 Den. 110; *Halstead v. Mayor, etc.*, 3 N. Y. 430; *Boom v. City of Utica*, 2 Barb. 104; *Donovan v. Mayor, etc.*, 33 N. Y. 291; *Smith v. City of Newburgh*, 77 N. Y. 130.) The action of the trustees in ordering the work without first applying to the board of education for the necessary authority did not constitute a mere technical irregularity which could be cured by subsequent ratification, but was an absolute violation of an express statutory prohibition, which could not be cured. (L. 1882, ch. 410, § 1029; *Smith v. City of Newburgh*, 77 N. Y. 130; 1 Dillon on Mun. Corp. 457.)

LANDON, J. The plaintiff seeks to recover \$600, being the price of a retaining wall on the easterly side of Primary School No. 14, at Nos. 73 and 75 Oliver street, in New York city, erected by plaintiff under a contract in writing, made by him with the board of school trustees of the fourth ward of the city of New York. The complaint alleges, and the answer admits, that the board of trustees made the contract "acting for and on behalf of, and for the benefit of, the board of education."

The Consolidation Act, in force at the time, by section 1035 provides: "It shall be the duty of the trustees for each ward, and they shall have the power, * * * under such general rules and regulations, and subject to such limitations as the board of education may prescribe, to conduct and manage

the said schools; to furnish all needful supplies therefor, and to make all needful repairs, alterations, and additions in and to the school premises."

Section 1029 provides: "No contract or contracts shall be made by the school officers of any ward for the purchase of any site without the consent of the board of education, or for the erection or fitting up or repairing of any building, when such repairs shall exceed in amount the sum of two hundred dollars, as authorized in this chapter, until a statement, in writing, of the amount required for that purpose shall have been presented to the board of education by said school officers, and, together with a copy of the working drawings, plans, and specifications of the work to be done, pursuant to the provisions of this chapter, shall have been duly filed and approved of as herein required, and an appropriation shall have been made by the board of education therefor."

The defense is that the defendant never made the appropriation specified in section 1029, and that, therefore, the board of trustees had no power to make the contract. The answer admits that when the contract was made "the defendant had ample funds for the payment thereof, and that said funds had been duly set aside by the proper authorities of the city of New York for the use of the defendant." The answer alleges that the defendant spent all of these funds before the plaintiff demanded payment. A jury trial having been waived, the trial court nonsuited the plaintiff and dismissed the complaint, the decision stating that it was under the authority of *Miller v. Mayor* (3 Hun, 35).

On April 7, 1890, the school trustees of the fourth ward asked the defendant to take the necessary action to protect the school building No. 14, in view of an excavation being made upon the adjoining lot by the owners thereof, and the trustees applied for an appropriation. The superintendent of school buildings thereupon reported to the defendant as follows:

"Building operations were commenced and upon consultation with the trustees, emergency work was approved by me,

and while I am endeavoring to obtain an estimate covering the entire work the character of the work may require that it be done by days' work, would respectfully recommend that the application be laid over, with the emergency work approved, until an agreement can be had as to the price or bills rendered."

"Commissioner Purdy moved that the action of the superintendent be approved, and that the matter of the expense be laid over. Adopted."

The inference is admissible in favor of the nonsuited plaintiff that the defendant thus directed the work to be done subject to the limitation expressed by it, that as the amount of the cost was not then known, the specific appropriation must lie over until it should be known. On the 24th of the same month the board of trustees accepted the proposal of the plaintiff to furnish the materials and erect the retaining wall for \$600, and thereupon made the contract with him. The evidence is to the effect that the defendant did all that was necessary to approve and ratify the contract, except that it omitted to make the specific appropriation.

The plaintiff could not protect himself against the defendant's exhausting its appropriation by obtaining the indorsement upon his contract by the comptroller, pursuant to section 123 of the Consolidation Act, the terms of that section not applying to an expenditure of less than \$1,000. The fact that the defendant, by spending its money after the contract was made, stripped itself of the means with which to perform it, has no relevancy to its power to authorize the making of it.

The defendant applied to the board of estimate and apportionment of the city under sections 204, 207 of the Consolidation Act to authorize the transfer from one of its educational bureaus, in which the appropriation was in excess of its needs, to the bureau of repairs, of a sum sufficient to enable the defendant to pay the plaintiff's bill and some other bills, but the board of estimate and apportionment, although having the power, refused to make the transfer. The latter board, through the city comptroller, visited upon the defendant its censure

for its irregular methods, and perhaps with justice, but the justice of the defendant's visiting the penalty of its methods upon the plaintiff is not apparent.

In *Miller v. Mayor (supra)*, upon which the trial court relied, the board of education had set apart a fixed sum to be expended in repairs and incidental expenses, and prohibited to the school trustees of the 22d ward any expenditure in excess of that sum. Nevertheless the trustees spent for repairs all the money they had, and then made a contract for further repairs and expenditure. The court held that they had exhausted their power before making the latter contract. Here, so far as the plaintiff is concerned, the question is not one of the defendant's lack of power, or of its acts in excess of its power. It had ample power, if regularly exercised, to authorize the board of trustees to make the contract in its behalf. Under the act the board of trustees was the agent of the defendant for the purposes of making the contract, subject to the limitations imposed by the defendant and the act. The only limitation upon its power in the case before us resulted from the omission of the defendant to make the specific appropriation. The defendant had the means and the discretionary power to make the appropriation, and it directed the work to be done, and the appropriation to lie over until the cost should be ascertained. The board of trustees knew that the appropriation had not been made, but the plaintiff did not know it.

"It is a settled doctrine of the law of agency in this state that where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice." (*Bank of Batavia v. N. Y., L. Erie & W. R. R. Co.*, 106 N. Y. 195.) The rule may not be of universal application against official corpora-

tions or boards, but it has been applied against towns in favor of *bona fide* holders of its obligations. (*Town of Solon v. Williamsburgh Sav. Bank*, 114 N. Y. 125; *Bank of Rome v. Village of Rome*, 19 N. Y. 20.)

It serves to protect the innocent against the active or constructive deceit of public officers, who, having the power in their discretion to do the act lying at the foundation of their authority, omit it, and fail to disclose the omission, but contract as if there were none. Of course, where the act omitted or represented as performed is not within the power of the principal or agent to perform, the rule is different. (*Cagwin v. Town of Hancock*, 84 N. Y. 542.)

Defenses by official boards resting upon their omission to do the acts they had the power to do in order to perfect the authority they assumed to exercise, are not favored when invoked against innocent parties dealing with them in good faith. (*Moore v. Mayor*, 73 N. Y. 238; *Reilly v. City of Albany*, 112 N. Y. 30.)

We assume that the trial court could have found that the plaintiff acted in the utmost good faith, and without actual knowledge that the appropriation had not been made; that the work which he performed was beneficial to the defendant; that the defendant intended to do all that was necessary to validate the contract, but through carelessness postponed making the appropriation until it could not make it; that the defendant ought to have made the appropriation; that it is unjust that it should visit the penalty of its omission upon the plaintiff.

The judgment should be reversed and a new trial granted, costs to abide the event.

PARKER, Ch. J., O'BRIEN, HAIGHT, MARTIN and VANN, JJ., concur; BARTLETT, J., not voting.

Judgment reversed, etc.

SYDNEY H. CARNEY, SR., Appellant, v. NEW YORK LIFE
INSURANCE COMPANY, Respondent.

CONTRACT OF EMPLOYMENT FOR LIFE — WHEN UNREASONABLE. A contract by which a person was employed for life, made by the executive officers of a life insurance company assuming to act under a by-law, previously adopted by the board of trustees, empowering them "to appoint, remove and fix the compensation of each and every person except agents employed by the company," is unreasonable, and not contemplated thereby, because, the term of office of said trustees being limited by statute, it must be assumed that they would not adopt a by-law authorizing the imposition of unreasonable contracts upon their successors in office.

Carney v. N. Y. Life Ins. Co., 19 App. Div. 160, affirmed.

(Argued March 6, 1900; decided April 17, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 21, 1897, affirming a judgment in favor of defendant entered upon a dismissal of the complaint upon the opening of plaintiff's counsel by the court at a Trial Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

James D. Fessenden for appellant. If from the by-law or any circumstance shown there was conferred a power to employ, then in making the contract in question the president and actuary were within their authority. (*Wallis v. Day*, 2 M. & W. 273; *Cook on Corp.* 708, 709; *Beveridge v. N. Y. E. R. R. Co.*, 112 N. Y. 23.) This contract is no longer executory on plaintiff's part, and the corporation is estopped to deny the original want of power in itself to make it, or in the two officials who made it on behalf of their principal. (*Cook on Corp.* [4th ed.] 90.)

William B. Hornblower and *George W. Hubbell* for respondent. The officers of the company had no express or implied power to make the contract in suit. (*Camacho v. H. B. N. & E. Co.*, 2 App. Div. 369; *Bright v. C. I. S. Y. Co.*, 83 Hun, 482; *De Bost v. A. P. Co.*, 35 Hun, 386; *Alexander v. Cauldwell*, 83 N. Y. 480; *Jemison v. C. S. Bank*, 122 N.

Y. 135; *Adrianse v. Roome*, 52 Barb. 411; *F. Nat. Bank v. O. Nat. Bank*, 60 N. Y. 287.)

HAIGHT, J. The action was brought to recover damages for a breach of contract of employment.

The plaintiff's counsel, in his opening, repeated the allegations of his complaint, which were in substance, that in December, 1869, the president and actuary of the defendant entered into an oral contract with the plaintiff, by the terms of which he was to enter the employment of the defendant in a medical capacity and that such employment should continue during his life; that for the first year his salary should be \$5,000, the second year \$5,500 and the third year \$6,000, and that it was to remain at that figure until changed by the parties; that pursuant to such contract he entered the employment of the defendant, which continued until the year 1895, with a salary which was increased from time to time until it reached \$12,000 per annum, and that on the 20th day of June, 1895, he was wrongfully discharged. The complaint further alleged that the board of trustees had adopted a by-law which was in force at the time of the making of the contract in 1869, by which the president and actuary were empowered "to appoint, remove and fix the compensation of each and every person except agents employed by the company." He demanded as damages \$168,000. The answer denied that the contract was for life and alleged that it was void.

It is claimed that the alleged contract was void under the Statute of Frauds, and, further, that it was a contract which neither the executive officers nor the board of trustees had the power to make under the authority of *Beers v. N. Y. Life Ins. Co.* (66 Hun, 75); but passing without determining these questions, we are of the opinion that the plaintiff has no cause of action, for other reasons which may be briefly stated.

The by-law alluded to must be given a reasonable interpretation. We may assume that the power given to appoint was intended to include the power to employ and to agree upon

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the compensation that should be paid, but in assuming this, we cannot believe that the board of trustees in adopting the by-law intended to invest the executive officers named with the power to enter into unreasonable contracts as to the term of employment. Under the statute, the board of trustees consisted of twenty individuals whose terms of office continued for four years, five being elected each year. The management and control of the corporation was given to the trustees. In construing the action of the board in adopting the by-law in question we must assume that they had in mind the provisions of the statute fixing their terms of office and that, at the expiration of that period, other persons may be chosen in their places, upon whom would rest the responsibility of the conduct and management of the business of the company, and that they had no right to interfere with the powers of future boards of trustees by imposing upon them unreasonable contracts. This provision of the statute may properly be taken into consideration by the court in determining whether the contract is reasonable. Having in view the provisions for the election of new officers upon whom would be cast the responsibility of the management of the company, and the evident purpose of the statute that the hands of the future officers should not be tied or their action unreasonably hampered, we think the contract in question must be held to be unreasonable and one not contemplated by the by-law, and consequently, one that should not be executed. In this case there is no dispute as to the facts, and, consequently, the questions arising with reference to the meaning of the by-law, and, as to whether the contract is reasonable, is for the court and not for the jury. (*Wright v. Bank of the Metropolis*, 110 N. Y. 237, 249; *Mead v. Parker*, 111 N. Y. 259, 262; *Sullivan v. N. Y. & Rosendale Cement Co.*, 119 N. Y. 348, 355; *Colt v. Owens*, 90 N. Y. 368.)

The judgment should be affirmed, with costs.

PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN, VANN and LANDON, JJ., concur.

Judgment affirmed.

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f163	845
162	456
f164	854
a164	877
162	456
f165	812

In the Matter of the Application of HARRY B. CHAPMAN, Respondent, for the Removal of JEFFREY P. THOMAS, Appellant, as Committee of NANCY C. WARNER, an Incompetent Person, and for an Accounting.

1. APPEAL — MODIFICATION BY APPELLATE DIVISION OF ORDER STATING ACCOUNT OF COMMITTEE OF INCOMPETENT. The Appellate Division has no power, upon reversing in part an order of Special Term charging the committee of an incompetent person with a certain sum upon the report of a referee appointed to take and state the account, to determine the facts anew and direct a judgment or order based upon the facts thus determined; it should remit the case to the court below for readjustment of the account.

2. FINAL ORDER — CODE OF CIV. PRO. § 1361. Such an order is a final order in a special proceeding, and upon an appeal therefrom the procedure, the rights of the parties and the rules of law are in all respects the same as in an action where the same issues are involved.

Matter of Chapman, 43 App. Div. 231, reversed.

(Argued February 28, 1900; decided April 17, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered September 18, 1899, modifying and affirming, as modified, an order judicially settling the accounts of the committee and removing him from his trust, entered upon the report of a referee. The appellant also sought to bring up for review the report of the referee; the appellant's removal as committee; the appointment of a new one, and the order appointing a special guardian for such incompetent.

The facts, so far as material, are stated in the opinion.

Charles Irving Oliver for appellant. The Appellate Division erred in assuming to modify the order as was done on the appeal, and for this error the order should be reversed. (3 Graham & Waterman on New Trials, 1129; 4 Wait's Pr. 234; *Moffett v. Sacket*, 18 N. Y. 522; *Cuff v. Dorland*, 57 N. Y. 560; *Whitehead v. Kennedy*, 69 N. Y. 462; *Andrews*

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v. *Tyng*, 94 N. Y. 20; *Lawrence v. Church*, 128 N. Y. 324; *Porter v. Dunn*, 131 N. Y. 319; *Canavan v. Stuyvesant*, 154 N. Y. 89.)

Arthur E. Andrews for respondent. The order removing the committee is not reviewable here, being discretionary with the Supreme Court. (Code Civ. Pro. § 2339; *De Camp v. Thomson*, 159 N. Y. 444.)

MARTIN, J. Upon the report of a referee appointed to take and state the account of the appellant as committee of the person and property of Nancy C. Warner, an incompetent person, the Special Term made an order by which the committee was charged with the sum of \$7,266.87 as being in his hands belonging to the incompetent's estate, and for which he was held liable. It is obvious from the record that in stating this account it was surcharged with the sum of twenty-nine hundred dollars which had already been charged, and thus in effect the committee was charged twice with that sum.

Upon appeal to the Appellate Division the court assumed to correct that error, but, unwilling to modify the order by deducting the amount thus charged twice and affirming it as modified, it proceeded to restate the account upon a new and different basis. It held that the principle adopted by the referee was improper, or at least was not the best that could be adopted; that the amount of the fund that came into the hands of the committee should be treated as principal; that it should be regarded as bearing interest, or at least so much of it as ought to have been kept invested, and that the referee should have ascertained and charged to the appellant's account the income it ought to have produced. It then determined that the principal was \$7,200.30; that \$5,100 of this fund was, for the period of twenty-one years, invested in United States bonds bearing five per cent interest, although the proof was directly to the contrary; that one thousand dollars was secured by a note of the committee, payable to the incompetent, with interest, and that there was eleven hundred dollars

of cash in his hands. It, thereupon, found that the part of the fund invested produced an annual income of \$315, and that if four hundred dollars was left in the hands of the committee for expenses, the remaining seven hundred dollars should have produced thirty-five dollars, making a total of three hundred and fifty dollars a year. This was followed by a calculation that three hundred and fifty dollars a year for twenty-one years would produce \$7,350, and that as the committee reported only \$3,517.03 of income, it was \$3,832.97 less than the court assumed it ought to have been. It also decided that the account of the committee should be surcharged with \$1,966.48, one-half of that difference, thus making the income charged to him \$5,483.51, which added to the principal, amounted to \$12,683.51. This amount it concluded to charge the committee. The court then stated that the committee claimed credit for disbursements amounting to \$8,580.98, which was allowed by the referee after deducting \$1,177.90 for credits in excess of five hundred dollars for which there were no vouchers, and held him entitled to credit for only \$6,903.08. Manifestly there was an error of five hundred dollars in this calculation, because \$1,177.90 deducted from \$8,580.98 leaves \$7,403.08 instead of the amount thus credited.

The appellant, however, contends that the Appellate Division had no authority to make the order granted. The effect of its decision was to reverse the order of the Special Term, and to hold that the principle adopted by the referee in stating the account was erroneous. It then declared the manner in which the amount to be charged to the committee should be ascertained. This was by determining the amount of the principal, by assuming without and contrary to the proof how much of it was or should have been kept at interest, by calculating the interest based upon such assumption, by deducting from the amount thus obtained the income admitted by the committee, by dividing the difference by two, and by adding the amount thus obtained to the amount so admitted. It then modified the order appealed from by sub-

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stituting that amount for the amount found by the Special Term and referee.

While it may have been competent for the Appellate Division to allow or reject a claim of either party where its amount had been definitely fixed or clearly determined, still it had no authority to determine the facts anew and direct a judgment or order based upon the facts thus determined. That is precisely what the court did, as it reversed the order as to a part of the account, declared the principle upon which it was adjusted erroneous, and proceeded to adopt a new and different one, and with no sufficient evidence to establish them, assumed certain facts and upon such assumption proceeded arbitrarily to fix an amount with which the committee should be charged. In doing this it committed an error amounting to \$500, so that even if it had the power assumed it was erroneously exercised. But we are of the opinion that the Appellate Division had no authority, after practically reversing the action of the referee and Special Term, to thus determine the case. Instead of deciding it upon an assumption of facts and conditions not proved, it should have remitted it to the court below for a readjustment of the account. That the learned Appellate Division had no authority to pursue the course adopted is well settled by the authorities in this court. (*Moffet v. Sackett*, 18 N. Y. 522; *Cuff v. Dorland*, 57 N. Y. 560; *Whitehead v. Kennedy*, 69 N. Y. 462; *Andrews v. Tyng*, 94 N. Y. 16; *Lawrence v. Church*, 128 N. Y. 324; *Porter v. Dunn*, 131 N. Y. 314; *Altman v. Hofeller*, 152 N. Y. 498; *Heller v. Cohen*, 154 N. Y. 299; *Benedict v. Arnoux*, 154 N. Y. 715, 724; *Snyder v. Seaman*, 157 N. Y. 449; *New v. Village of New Rochelle*, 158 N. Y. 41.)

In *Moffet v. Sackett* it was held that while the General Term on appeal had power to reject a claim of either party where its extent had been definitely fixed or determined, yet it had no authority to determine the facts and direct a judgment or order based thereon. The *Cuff* case was to the effect that the appellate court had no power, upon reversal, to

render a judgment in favor of the appellant, unless the facts upon which it was founded were agreed upon by the parties or found by the trial court or jury. In *Andrews v. Tyng* it was declared that the Appellate Division had no authority to determine the amount of unsettled damages, at least where the facts found below were insufficient to show the true amount. In the *Porter* case it was held that the General Term had no right to change the judgment, as it had no power to determine any of the questions involved where the evidence was in conflict. *Altman v. Hofeller* was to the effect that the Appellate Division must either totally affirm or reverse, both as to the recovery and as to the parties, except where there were separate and distinct judgments or an error existed as to a separate claim or defense, which related only to a transaction between two of the parties, and in that case that a judgment may be reversed as to them and affirmed as to the remainder. In the *Benedict* case it was held that the Appellate Division, under section 1022 of the Code of Civil Procedure, upon reversing a judgment must grant a new trial, and that it could not properly render a final judgment unless the facts were conceded or undisputed, or established by official record, or found by the trial court, or it appears that no possible state of proof applicable to the issues would entitle a party to a judgment, and that this rule applies to actions in equity as well as actions at law. In that case it was said: "It is one of the fundamental principles of our law that questions of fact are to be tried and determined in a court of original jurisdiction, and it is not the appropriate function of an appellate court to determine controverted questions of fact and render final judgment upon such determination."

If it be said that the appeal in this case is from an order, and, therefore, the principle of the decisions cited does not apply, the answer is that this was a final order in a special proceeding and is governed by the same rules as are appeals from judgments. (Code of Civil Procedure, § 1361.) The procedure and rights of the parties upon an appeal from such an order are to be considered in the same manner and are sub-

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ject to the same powers and limitations as in an action where the same issues are involved. (*People ex rel. Manhattan Ry. Co. v. Barker*, 152 N. Y. 417.)

Upon the argument it was claimed by the appellant that the petitioner had no standing or authority to institute this proceeding; that the incompetent was a necessary party to it, and that she was not properly made such, and that section 2729 of the Code of Civil Procedure has no application to this case, and, hence, that the courts below were in error in holding that the committee was not entitled to credit in excess of five hundred dollars for amounts expended by him for which no vouchers were produced. We deem it unnecessary to decide any of those questions at this time.

We are of the opinion that, after practically reversing the action of the referee and Special Term, the Appellate Division had no authority to proceed to determine the case in the manner it did. Instead of deciding it upon the assumption of certain facts and conditions not proved, the case should have been remitted to the Special Term for a resettlement of the committee's account. We think that should be done at this time. The respondent will then be in a position where the errors, if any, in the manner of instituting the proceeding, or the omission of necessary parties, may be remedied by the inauguration of a new proceeding or otherwise as he may be advised.

The order of the Appellate Division should be reversed, with costs to the appellant payable out of the fund, and the proceeding remitted to the court below for further action.

PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT and VANN, JJ., concur; LANDON, J., not sitting.

Order reversed, etc.

EUGENE A. JOHNSON, Respondent, v. THE LONG ISLAND RAIL-
ROAD COMPANY, Appellant.

1. EJECTMENT—NOT MAINTAINABLE BY MEMBER OF MONTAUK TRIBE OF INDIANS, SUING FOR ALL WHO MAY CONTRIBUTE. A member of the Montauk Tribe of Indians cannot maintain an action of ejectment on behalf of himself and all other persons equally interested with him, who may come in and contribute to the expenses of the action, as such tribe has no statutory right or capacity to bring such an action, and no corporate name by which it can institute it, and, therefore, no one member can sue for the benefit of all, as the cause of action does not exist.

2. REMEDY IS BY ENABLING ACT. The tribe is not without legal redress, as by an application to the legislature an enabling act can be obtained allowing action to be brought in the name of its chief or head, or of such member or members thereof as may be selected.

Johnson v. Long Island R. R. Co., 42 App. Div. 626, reversed.

(Argued February 26, 1900; decided April 17, 1900.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the second judicial department, entered October 25, 1899, reversing an interlocutory judgment of the Special Term sustaining a demurrer to the complaint.

The nature of the action, the facts, so far as material, and the questions certified are stated in the opinion.

Alfred A. Gardner and *William J. Kelly* for appellant. An Indian tribe has no legal capacity to sue in ejectment for tribal lands unless authorized to do so by statute. (*Montauk Tribe v. L. I. R. R. Co.*, 28 App. Div. 470; *Seneca Nation v. Christie*, 126 N. Y. 122.) The individual Johnson cannot maintain this action on behalf of the alleged tribe as a tribe. (Code Civ. Pro. § 449.) An Indian tribe is a separate quasi-political unity. The right to its tribal lands is a right of temporary occupancy and is the right of an independent power, not of individuals. (*Seneca Nation v. Christie*, 126 N. Y. 135; *Town of Southampton v. M. B. O. Co.*, 116 N. Y. 7; *Trustees of East Hampton v. Vail*, 151 N. Y. 471; *Fellows v. Denniston*, 23 N. Y. 423; *Elk v. Wilkins*, 112 U. S. 99;

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People v. Dibble, 16 N. Y. 212; *Goodell v. Jackson*, 20 Johns. 709; *Worcester v. State of Georgia*, 6 Pet. 558; *The Cherokee Trust Funds*, 117 U. S. 311; *Howard v. Moot*, 64 N. Y. 271.) No cause of action is stated in behalf of Johnson as an individual. (*Sheridan v. Jackson*, 72 N. Y. 173; *Scofield v. Whitelegge*, 49 N. Y. 260; *Cook v. Warren*, 88 N. Y. 40; *Knapp v. City of Brooklyn*, 97 N. Y. 523.) No authority is found in the Indian Law of New York for this action. (L. 1892, ch. 679, § 70; L. 1845, ch. 150.) One may not sue for many in ejectment. (*West v. Randall*, 2 Mason, 181; *Wormley v. Wormley*, 8 Wheat. 456; *Conro v. P. H. I. Co.*, 12 Barb. 58; *McKenzie v. L'Amoureux*, 11 Barb. 518; *Kerr v. Blodgett*, 48 N. Y. 66.)

Francis M. Morrison and *Leman B. Treadwell* for respondent. The capacity to sue is independent of a cause of action, and the facts showing the plaintiff's capacity to sue are not the facts which constitute his cause of action. (*Bank of Louisville v. Edwards*, 11 How. 216; *Viburt v. Frost*, 3 Abb. Pr. 120; *Myers v. Machado*, 6 Abb. Pr. 198.) The absence of capacity to sue must appear in the complaint, and if it merely fails to show the facts conferring capacity, the objection must be taken by answer. (*Phoenix Bank v. Donnell*, 40 N. Y. 410; *Barclay v. Q. M. Co.*, 6 Lans. 25; *Bank of Havana v. Magee*, 20 N. Y. 355.) Plaintiff's legal capacity to sue cannot be questioned under the third question submitted herein, "that the complaint does not state facts sufficient to constitute a cause of action." (*Van Zandt v. Van Zandt*, 26 N. Y. S. R. 963; Code Civ. Pro. § 490; *Foley v. M. & E. Pub. Co.*, 28 N. Y. Snpp. 778.) The right of the Indian to bring suit is expressly conferred by statute. (1 R. S. [9th ed.] 204, § 5.) The right of one or more persons to prosecute an action on behalf of themselves and others having a common general interest with them is well settled. (*Bear v. A. R. T. Co.*, 36 Hun, 400; *Mead v. S. L. M. L. Ins. Co.*, 61 How. Pr. 1; *Bloete v. Simon*, 19 Abb. [N. C.] 88; *Strasser v. Moonelis*, 23 J. & S. 197; *Rogers v. N. Y. & T. L. Co.*, 17 N. Y. S. R.

131; *Jones v. Felch*, 3 Bosw. 63; *McKenzie v. L'Amoureux*, 11 Barb. 516.) There is no defect of parties plaintiff in this action, in that the members of the alleged Montauk Tribe of Indians are not made parties plaintiff. (*Strong v. Waterman*, 11 Paige, 607; *Seneca Nation v. Christie*, 126 N. Y. 122; 162 U. S. 283.) Where two or more persons are entitled to the possession of real property, as joint tenants or tenants in common, one or more of them may maintain an action to recover his or their undivided shares in the property, in any case where such an action might be maintained by all. (Code Civ. Pro. § 1500; *Cruger v. McLaury*, 41 N. Y. 219; *Kellogg v. Kellogg*, 6 Barb. 116; *Hubbell v. Lerch*, 58 N. Y. 237.) The complaint herein states facts sufficient to constitute a cause of action. (Code Civ. Pro. § 1500; *Shepard v. M. Ry. Co.*, 117 N. Y. 442; *Hasbrouck v. Bunce*, 62 N. Y. 476; Swan on Pleading, 156; *Taylor v. Crane*, 15 How. Pr. 358; *Frost v. Duncan*, 19 Barb. 560; *Viburt v. Frost*, 3 Abb. Pr. 119; *Hobart v. Frost*, 5 Duer, 672; *Phoenix Bank v. Donnell*, 40 N. Y. 410; *F. F. Ins. Co. v. Baldwin*, 37 N. Y. 648.)

BARTLETT, J. This appeal is taken by permission of the Appellate Division, which certified three questions to this court: (1) Has the plaintiff in this action legal capacity to sue? (2) Is there a defect of the parties plaintiff in this action, in that the members of the alleged Montauk Tribe of Indians are not made parties plaintiff? (3) Does the complaint herein state facts sufficient to constitute a cause of action?

This is an action of ejectment brought by the plaintiff, a citizen of the United States of Indian blood and lineage and a member of the Montauk Tribe of Indians by right of birth and affiliation, on behalf of himself and all other persons equally interested with him, who may come in and contribute to the expenses of the action.

The demurrer contains a number of grounds stated in detail why the plaintiff cannot maintain this action.

The single question presented is, whether the plaintiff as a member of this tribe of Indians can maintain ejectment on behalf of the tribe in the form of action already described.

The Special Term sustained the demurrer to the complaint, but the Appellate Division, with a divided court and expressing the opinion that the plaintiff's right is not free from doubt, reversed the interlocutory judgment on the ground that this action is brought in accordance with the views expressed on a prior appeal.

Justice WILLARD BARTLETT dissenting was of the opinion that the complaint in the present action was not framed in accordance with the previous decision.

The prior appeal referred to was in the case of *Montauk Tribe of Indians*, by Wyandank Pharoah, their chief and king, against the present corporation defendant. (28 App. Div. 470.)

In that case a demurrer was sustained to the complaint on the ground that the plaintiff had no legal capacity to sue, and the Appellate Division affirmed the interlocutory judgment to that effect.

CULLEN, J., who wrote the opinion of the court, in which all of the justices concurred, said: "It is not worth while to enter upon any discussion of the *status* of the Indian tribes within this state, as we think that on the question now before us we are concluded by authority. In *Strong v. Waterman* (11 Paige, 607) it was held that, while the Indians had the undoubted right to the beneficial use and occupancy of their lands, no provision had been made by law for bringing ejectment to recover possession of them; that as a body or tribe, the Indians have no corporate name by which they can institute such a suit."

The learned judge then pointed out that the same doctrine had been laid down in *Seneca Nation v. Christie* (126 N. Y. 122.)

That was an action of ejectment brought by the Seneca Nation of Indians to recover certain lands in Erie county, and this court held that the right of the plaintiff to sue in that form was given by, and was dependent upon a statute,

which was a special act for the protection and improvement of the Seneca Indians residing on certain reservations in this state. (Chap. 150, Laws 1845.)

Judge ANDREWS, who wrote the opinion of the court, cites on this point the case of *Strong v. Waterman* (*supra*) undoubtedly to show that under the law of the state as it then stood, this action could not be maintained by the Indian tribe, except by the provisions of an enabling act.

In the case of *Strong v. Waterman* (*supra*) the action was brought by Strong and Gordon, chiefs of the Seneca Nation of Indians against a white man for an injunction restraining him from committing trespasses and waste upon the reservation of the tribe and from interfering with its possession.

The immediate proceeding was a motion to dissolve this injunction. The chancellor, in the course of his opinion, states: "No provision, however, has been made by law for the bringing an ejectment to recover the possession of Indian lands in the Cattaraugus reservation. For the right to the possession is in several thousand individuals in their collective capacity; which individuals, as a body, have no corporate name by which they can institute an ejectment suit. * * * The Indians cannot therefore institute a suit in the name of the tribe; but they must sue in the same manner as other citizens would be required or authorized to sue, for the protection of similar rights."

It was, therefore, held that the two persons named as complainants, having been authorized by the council of chiefs, might file a bill for an injunction, to which reference has been made, to protect their possession. This was placed expressly upon the ground that if the common law furnished no sufficient protection of the rights of the tribe it is a part of the acknowledged jurisdiction of equity to interpose for its relief.

The learned chancellor evidently recognized a broad distinction between the rights of the tribe in defending its possession of lands and bringing ejectment to secure possession.

We have been cited to no statute nor to any controlling decision authorizing the present action.

The respondent has referred to certain sections of the Indian Law as tending to authorize this action, more particularly section 11 thereof, relating to trespasses on tribal lands, which provides that an action may be brought in the name of the People of the state against any person other than an Indian trespassing upon the tribal lands, by the district attorney of the county, or in the name of the nation, tribe or band, by any three of the chiefs, head men or councillors thereof, etc.

This section obviously has no application to the present situation, and substantially existed as section 8 of chapter 234 of the Laws of 1841, which was in force four years before the decision of *Strong v. Waterman* (*supra*). It is a clear recognition of the necessity for legislation in the premises at that early day.

In the opinion to which reference has already been made, Justice CULLEN said (28 App. Div. 472): "Still the Indians are not without redress. They may apply to the legislature for authority to maintain an action like the present, *or it may be that*, under the authority of *Strong v. Waterman* (*supra*), an action might be instituted by one of their number on his own behalf and on behalf of the other Indians of his tribe."

This is evidently the view expressed on the prior appeal, which led the Appellate Division, in the order we are reviewing, to hold that this plaintiff had legal capacity to sue.

It is to be observed that the learned judge, after referring to the undoubted right of the legislature to authorize the action, merely suggested that, under the authority of *Strong v. Waterman* (*supra*), it might be that an action like the present could be instituted. The expression is evidently intended as a view of the case, concerning which the writer was in doubt. As already intimated, we do not regard *Strong v. Waterman* (*supra*) as authorizing this action.

A decision holding that this action could be maintained either by the tribe, or an individual member thereof, on behalf of himself and all others who should come in and contribute, would be contrary to the policy and practice which have been long established in our treatment of the Indian.

tribes. They are regarded as the wards of the state, and generally speaking, possessed of only such rights to appear and litigate in courts of justice as are conferred upon them by statute.

It is conceded by the complaint in this action "that the tribe have no legal capacity to sue therefor and have no corporate name by which they can institute such a suit."

The theory of an action by one for the benefit of all is, that where a large number of persons, not incorporated, are vested with a cause of action, it may be enforced in that manner, but when it is admitted, as in this case, that the tribe has no cause of action, it follows, logically, that no one member of the tribe could sue for the benefit of all, as the cause of action does not exist.

We are of opinion, however, that the Montauk Tribe of Indians are not without legal redress in the premises, as by an application to the legislature an enabling act can be obtained allowing action to be brought on behalf of the tribe, in the name of its chief or head, or in the name of such member or members thereof as may be selected.

It is much better that this course should be pursued than to sustain an action in the present form, which it is conceded by the learned court below is not free from doubt, and which we regard as contrary to long-established public policy.

We answer the three questions certified to us in the negative.

The order appealed from should be reversed and the interlocutory judgment affirmed, but, under the circumstances, without costs to either party in this court.

O'BRIEN, HAIGHT and MARTIN, JJ., concur, and PARKER, Ch. J., concurs in result; VANN and LANDON, JJ., dissent.

Order reversed, etc.

ROSA STRAUSS and LOUIS ULLMANN, as Executors of YETTA ULLMANN, Deceased, Appellants, v. HENRY M. BENDHEIM, Defendant. LEOPOLD HUTTER, Respondent.

1. SPECIFIC PERFORMANCE OF CONTRACT MADE BY EXECUTORS UNDER POWER OF SALE — PARTIES — RESALE BY REFEREE. Executors, having an unqualified and imperative power to sell and convey real estate and convert it into cash for the purpose of dividing the same among legatees, have power to make a contract of sale and enforce such contract by an action for specific performance against a purchaser, without making the beneficiaries parties, and in such action the court has power to adjudge a resale by a referee with a personal judgment for any deficiency against the defendant, and the deed of the referee to a purchaser at such sale conveys all the title the executors had under their power of sale and the purchaser must accept it.

2. DEED OF REFEREE PURSUANT TO POWER OF SALE. Where the recitals in the referee's deed show that it purports to convey the title of the testatrix through the power given by her will as it had been determined by the court, the validity of the deed is not affected by the fact that it conveyed all the right, title and interest of the executors and of the original purchaser at the time of the entry of the judgment, as the executors had a right under the power and the purchaser had an equitable title.

3. INFANTS' REAL ESTATE — SALE BY SPECIAL GUARDIAN TO HIS WIFE — MARKETABLE TITLE. The conduct of a special guardian of infants in selling their real estate to his wife is not to be commended; but where it appeared that the sale was confirmed by the court in which the proceeding was instituted, with full knowledge upon its part of all the facts, the title cannot, after the lapse of twenty-six years and long after all of the infants have become of age, be questioned.

Strauss v. Bendheim, 44 App. Div. 82, reversed.

(Argued February 26, 1900; decided April 17, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 9, 1899, reversing an order requiring Leopold Hutter to complete his purchase of the premises described in the complaint, entered upon a decision of the court on trial at Special Term.

The nature of the proceeding and the facts, so far as material, are stated in the opinion.

Charles F. Brown and *Samuel D. Levy* for appellants. The reversal of the order of the Special Term cannot be sustained. (*Everitt v. Everitt*, 29 N. Y. 39; L. 1896, ch. 547, § 137; *Johnson v. Wallis*, 3 N. Y. S. R. 140; 112 N. Y. 230; *Mott v. Ackerman*, 92 N. Y. 539; *Bostwick v. Beach*, 103 N. Y. 414; *Faile v. Crawford*, 30 App. Div. 536; *Clark v. Hall*, 7 Paige, 382; Pom. Eq. Juris. §§ 135, 368, 372, 1161; Story's Eq. Juris. §§ 789, 790, 1212, 1213; *Champion v. Brown*, 6 Johns. Ch. 398.) The decree made by the Court of Common Pleas in 1873 authorizing the guardian to convey the real estate belonging to the infants named below to Louisa Weiher cannot be attacked by the purchaser collaterally. (*Hunt v. Alexander*, 45 N. Y. Supp. 814; *Johnson v. O'Connor*, 47 N. Y. Supp. 425; *De Caters v. De Chaumont*, 3 Paige, 177; *Scholle v. Scholle*, 101 N. Y. 167.) Every one of the infants interested in the real property in question have long ago attained their majority, and by permitting the owner of the property to remain in undisputed possession for twenty-six years, have confirmed and ratified the contract made by their general guardian in 1873 on the sale of that property. (*Aldridge v. Funk*, 16 N. Y. S. R. 508.) The sale by the special guardian is valid, and the title good through this sale; because the court, on the application by the special guardian for the sale of the infants' interest in the premises, inquired into all the facts, and was informed that the intending purchaser was the wife of the special guardian and through a referee duly appointed authorized the special guardian to contract with his wife, Louisa Weiher, for the sale of the property for an approved price equal to the value found by the referee. (*Scholle v. Scholle*, 101 N. Y. 167; *De Caters v. De Chaumont*, 3 Paige, 178; *Davoue v. Fanning*, 2 Johns. Ch. 252; *Harrington v. E. C. Sav. Bank*, 101 N. Y. 257; *Dugan v. Denyse*, 13 App. Div. 214.) The title to the property in question being free from reasonable doubt, the purchaser obtains a marketable title. (*Cambrelleng v. Purton*, 125 N. Y. 610; *Moser v. Cochrane*, 107 N. Y. 35; *Kullman v. Cox*, 49 N. Y. Supp. 908.)

Franklin Pierce and *E. Arnstein* for respondent. The deed of Lorenz Weiher, as special guardian, to Louise Weiher, his wife, created title in her, subject to be avoided by the infants; and although twenty-six years have passed since the deed was given, the burden to show that none of these infants or their heirs have been under a disability during that period is upon the appellant. (*Davoue v. Fanning*, 2 Johns. Ch. 251; *Hatfield v. Sneden*, 54 N. Y. 280; *Gardner v. Ogden*, 22 N. Y. 349; *Lingke v. Wilkinson*, 57 N. Y. 445; *Barr v. N. Y., L. E. & W. R. R. Co.*, 125 N. Y. 274; *Steinway v. Steinway*, 2 App. Div. 304; *Hinman v. Devlin*, 31 App. Div. 592; *Atkins v. Judson*, 33 App. Div. 47; *L. T. Co. v. L. N. A. & C. R. R. Co.*, 164 U. S. 688; *Tyler v. Sanborn*, 128 Ill. 136.) The confirmation by the court of the sale in this case made by the guardian *ad litem*, does not make the voidable title valid. (*People v. Merchants' Bank*, 35 Hun, 97; *Bennett v. Austin*, 81 N. Y. 308; *O'Donoghue v. Boies*, 159 N. Y. 102.) The mere lapse of twenty-six years since this sale by the guardian *ad litem*, with no other facts shown, does not amount to an acquiescence on the part of the infants. (*Hatch v. Hatch*, 9 Ves. 229; *Kahn v. Chapin*, 152 N. Y. 305; *Platt v. Platt*, 58 N. Y. 646; 12 Am. & Eng. Ency. of Law, 600, n. 1; *Blank v. Sadlier*, 153 N. Y. 556; *Simis v. McElroy*, 12 App. Div. 434; 160 N. Y. 156; *Hendricks v. Gillespie*, 25 Gratt. 197; *Lockett v. Williamson*, 31 Mo. 57; *McCroskey v. Ladd*, 28 Pac. Rep. 217; *Hartley v. Smith*, 11 Buck, 368.) The objection that the referee's deed did not unquestionably convey the title of all persons having any interest in the real estate is well founded. (*Prentice v. Janssen*, 79 N. Y. 478; *Armstrong v. McKelvey*, 104 N. Y. 179; *Sweeney v. Warren*, 127 N. Y. 426; *Drake v. Paige*, 127 N. Y. 569; *Mellen v. Mellen*, 139 N. Y. 210; *McDonald v. O'Hara*, 144 N. Y. 566; *People ex rel. v. Scott*, 8 Hun, 566.) The decree at Special Term provided that the proceeds of the judicial sale, after paying the sum due the executors, together with their costs and disbursements, should be paid by the referee to Bend-

heim. The referee, however, whose title the purchaser is compelled to take by the order of the Special Term, had only the title of the parties to the action, and he cannot be regarded as having any authority to execute the power of sale for the executors. (*Pewabic Mining Co. v. Mason*, 145 U. S. 349; *Holly v. Hirsch*, 135 N. Y. 590; *Thomson v. Smith*, 63 N. Y. 301; *Potter v. Ellice*, 48 N. Y. 321; *Abbott v. James*, 111 N. Y. 673; *Noonan v. Brennemann*, 22 J. & S. 337; *McCotter v. Lawrence*, 4 Hun, 107; *Fisher v. Banta*, 66 N. Y. 468; Code Civ. Pro. §§ 1471, 1557, 1623.) The title which a purchaser at a judicial sale is entitled to must be a marketable title beyond question. (*Holly v. Hirsch*, 135 N. Y. 598; *Haberman v. Baker*, 128 N. Y. 253; *Fleming v. Burnham*, 100 N. Y. 1; *Toole v. Toole*, 112 N. Y. 333; *Simis v. McElroy*, 12 App. Div. 434; 160 N. Y. 156; *Vought v. Williams*, 120 N. Y. 253; *Shriver v. Shriver*, 86 N. Y. 575; *Moore v. Williams*, 115 N. Y. 586; *Irving v. Campbell*, 121 N. Y. 353; *Hinckley v. Smith*, 51 N. Y. 21.)

HAIGHT, J. Yetta Ullmann died in the city of New York on the 17th day of November, 1897, seized of the lands in question, and leaving a last will and testament which has been duly proved and admitted to probate in which, after providing for her funeral expenses, tombstone and a legacy to her brother, she appoints her son and daughter, the plaintiffs in this action, her executor and executrix, and directs that the residue and remainder of her estate be converted into cash and the proceeds divided into three parts; one part is given to her daughter, the executrix, another part to her son, the executor, and the remaining part to the children of her deceased daughter Fanny Reinhardt. For this purpose she empowered her executor and executrix, or the survivor of them, to sell and convey, grant and dispose of any and all of her real estate at any time after her demise as they might see fit, practicable and expedient, upon such terms and conditions, and in such manner, in their discretion, as they or the survivor of them should deem just or proper, and to make,

execute, acknowledge and deliver any and all deeds necessary or proper to give a marketable title. Pursuant to the power so given by the will the executor and executrix entered into an agreement in writing with the defendant Henry M. Bendheim, on the 18th of March, 1898, in which they agreed to sell and convey, and he to purchase, the premises in question for the sum of \$12,500. On the day named in the contract for the delivery of the deed and the payment of the purchase price Bendheim objected to the title and refused to complete the purchase. Thereupon an action was brought to compel specific performance, which resulted in a judgment in favor of the appellants, decreeing specific performance on the part of the defendant and adjudging that in case he refused to receive the deed and pay the consideration stipulated in the contract the premises be sold at public auction by a referee named in the judgment, who was directed to deliver to the purchaser a deed of the premises upon his complying with the terms on which the premises should be sold, and, after deducting from the proceeds the referee fees and the costs of the action, to pay to the plaintiffs the balance of the purchase money, and if the proceeds of the sale were insufficient to pay the plaintiffs in full, then they were to have judgment for the deficiency against the defendant Bendheim. The defendant Bendheim refused to receive the deed or to specifically perform the contract as required by the judgment, and thereupon the premises were again sold under the judgment and the respondent Hutter became the purchaser on such sale. The referee, pursuant to the provisions of the judgment, himself executed a deed and tendered it to Hutter, together with a deed from the executor and executrix, and demanded that he complete the purchase, but he refused to accept the deeds, claiming that they did not give to him a marketable title.

The first question presented for review is whether the Supreme Court had the power to authorize a sale of the premises by a referee in the action brought by the executors for specific performance, without making the beneficiaries under

the will parties. It is true that under the will of Yetta Ullmann no trust was created and the title to the lands was not vested in the executors. The will, however, did invest the executors with an imperative power of sale, with the broadest discretion in reference to terms and conditions. Acting under the power so given by the will they contracted to convey to Bendheim, and this they had the power to do without making the beneficiaries parties to the contract, and had Bendheim performed his part of the contract the executors could have conveyed to him all of the title to the premises that the testatrix had in her lifetime. Bendheim having refused to perform on his part, the executors had the right to bring an action to compel specific performance by him, and the beneficiaries under the will were not necessary parties in such action. The will having given the executors the power to sell, the duty devolved upon them of exercising that power according to their own wisdom and judgment, and their action bound the beneficiaries. With the power to sell, of necessity, was the power to contract, and with that the power to enforce the contract. In the action so brought judgment was entered for specific performance, following the well-known practice of adjudging a resale, with a personal judgment for deficiency in case the defendant refused or failed to specifically perform the contract. (*Clark v. Hall*, 7 Paige, 382, 385.) Judicial sales are usually made by a referee designated by the court or the sheriff of the county, either officer named being the instrument of the court to execute its decree and as such invested with the power of the court to convey all of the title that the court had the power to order transferred. In this case the executors, who were invested with the power to sell and convey under the will in the action brought by them, appealed to the court to enforce the performance of the contract made by them, thus investing the court with all the powers that they possessed under the will to compel specific performance of the contract. It follows that the referee's deed, tendered to the purchaser under the sale made pursuant to the judgment, would have conveyed to him, if accepted,

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all of the title to the premises which the executors, under their power of sale, could have conveyed.

It is further contended that the deed tendered by the referee was defective for the reason that it recited that it conveyed "all the right, title and interest" of the executors and of the defendant Bendheim "at the time of the entry of said judgment, it being their interest in said premises so sold and conveyed." It is quite true that the executors did not have the title, and the defendant Bendheim, as contractor, had an equitable title only, but each was possessed of a right or interest, the executors of a power under the will, and the defendant of an interest in the money which he had paid under the contract and through his obligation to complete the purchase. Upon referring to the terms of the deed, we find that it recites all the facts incorporated into the judgment with the authority given to the trustee to convey, from which it clearly appears that the deed purports to convey the title of the testatrix through the power given by her will as it had been determined by the court.

In 1873 one Charles Landauer died intestate, seized of the premises in question. He left him surviving a widow, four children and seven infant grandchildren who were children of deceased daughters of the intestate. On the 12th day of August, 1873, the infants, those over fourteen years of age themselves, and those under that age by their father and next friend, petitioned the Court of Common Pleas for the sale of their interests in the premises. Upon such petition the court appointed Lorenze Weiher, the father of some of the infants, special guardian and referred the matter to a referee to report the necessity for the sale. The referee took the evidence and made his report, which was confirmed by the court, and the guardian was ordered to enter into a contract for the sale of the premises. This he did with Louise Weiher, his wife. The contract was reported to the court, where it was confirmed, and the sale concluded, the purchaser giving a mortgage for the amount going to the infants, payable upon their arrival at the age of twenty-one years. The final order of confirmation

was entered on the 23d day of October, 1873. It is now contended that the title is defective, for the reason that the wife of the special guardian became the purchaser in such proceedings. This question was raised by the defendant Bendheim, and received the attention of the court in the trial of that action, but it does not appear to have been considered by the Appellate Division in these proceedings. While the court will look with disfavor upon an attempt of an officer conducting a judicial sale to convey to his wife, still the court doubtless has the power in the exercise of its discretion to permit and approve such a sale. The leading case in this state upon the subject is that of *Davoue v. Fanning* (2 Johns. Ch. 252), which was decided before the adoption of the Married Women's Act. In that case the practice was denounced as poisonous in its consequences and the court refused to approve of the sale, but in the judgment entered the court directed that the premises should be re-exposed for sale by public auction, and if the premises failed to sell for an amount greater than the amount of the former sale, the former sale should in all respects stand confirmed. It thus appears that the court in that case held that under circumstances similar to those in question it had the power to confirm, which power it would exercise in case it appeared that the premises could not be sold for any greater sum. In the case under consideration the report of the special guardian made upon oath to the court shows that the contract was for the best terms upon which he could sell the property. It clearly appeared in the testimony taken in the proceeding that Louise Weiher was his wife, and that fact was necessarily before the court when it made the order confirming the contract and directing the conveyance. This, as we have seen, the court had the power to do, and inasmuch as it approved of the sale with full knowledge of the facts, we think the title cannot now, after the lapse of twenty-six years, and long after all of the infants have become of age, be questioned.

It appears, as we have seen, that the deed from the executors was tendered to the purchaser in connection with the deed

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from the referee. This fact is recited in the order of the Special Term, but in directing the purchaser to accept the deed tendered by the referee the order omits to include that of the executors. While we are of the opinion that the referee's deed conveys the full title, there can be no harm in giving the purchaser the benefit of the deed from the executors, which was tendered to him and made one of the papers upon which the order was issued. The order should be modified in this particular.

The order of the Appellate Division should be reversed and that of the Special Term, as modified, affirmed, with costs.

PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN, VANN and LANDON, JJ., concur.

Order reversed, etc.

DELINA CREAMER, Respondent, v. JOHN MURRAY MITCHELL,
Appellant.

GUARANTY OF ROYALTIES — CONSTRUED WITH MAIN CONTRACT. A guaranty of the payment of the "royalty of \$30 per week only" secured to an inventor for a term of years by a certain agreement entitling him to a royalty from a licensee that is guaranteed to amount to at least \$2,000 per year and to advances of \$30 per week on account of said royalty, and by the terms of which he agrees to devote his time and attention to the best of his ability to the business of the licensee as superintendent of construction and salesman, "if requested so to do" by the licensee, though the guaranty also says that it shall run only so long as the license remains uncanceled and the inventor "shall continue as salesman and superintendent of construction * * * and render such services as provided in said contract," binds the guarantor to the payment of all such weekly royalties as may become due under the main contract, and remains in force notwithstanding the inventor's discharge from his position as superintendent and salesman, where the license was not canceled and he continues to be willing to render his services if requested.

Creamer v. Mitchell, 12 App. Div. 850, affirmed.

(Argued March 8, 1900; decided April 17, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered

December 22, 1896, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

Carlisle Norwood for appellant. The defendant's liability is upon an express condition and his contract is to be strictly construed. (*E. Nat. Bank v. Kaufman*, 93 N. Y. 273; *Smith v. Molleson*, 148 N. Y. 241; *Kingsbury v. Westfall*, 61 N. Y. 356; *Ward v. Stahl*, 81 N. Y. 406; *Grant v. Smith*, 46 N. Y. 93; *De Luka v. Goodwin*, 142 N. Y. 194; *J. H. M. L. Ins. Co. v. Lowenberg*, 120 N. Y. 44; *Hamilton v. Van Rensselaer*, 43 N. Y. 244; *Bennett v. Draper*, 139 N. Y. 266; *Walrath v. Thompson*, 6 Hill, 540; *Nat. M. B. Assn. v. Conkling*, 90 N. Y. 116.) The defendant and the plaintiff's assignor must have had in mind, when the contract of guaranty was made, the possibility that the company would not request Creamer to serve as salesman or superintendent. (*Dolan v. Rodgers*, 149 N. Y. 489; *Lorillard v. Clyde*, 142 N. Y. 456; *People v. G. M. L. Ins. Co.*, 91 N. Y. 174; *Bruce v. F. N. Bank*, 79 N. Y. 154.) The plaintiff's assignor was not willing and ready to perform after March 30, 1892, as shown by his attitude in the injunction suits. (*Wharton & Co. v. Winch*, 140 N. Y. 287; *Mayo v. Knowlton*, 134 N. Y. 250; *Terry v. Munger*, 121 N. Y. 161; *Werner v. Tuch*, 127 N. Y. 217.) This judgment cannot be sustained in the face of the confessed fact that the express condition upon which the defendant's liability depended has not been performed, without reading into the contract between Creamer and the defendant some covenant or promise on the part of the latter which was not expressed and cannot fairly be implied. (*Dermott v. State*, 99 N. Y. 101; *Bruce v. F. N. Bank*, 79 N. Y. 154; *Hornbostel v. Kinney*, 110 N. Y. 94; *Jugla v. Troutt*, 120 N. Y. 21; *Zorkowski v. Astor*, 156 N. Y. 393; *Lorillard v. Silver*, 36 N. Y. 578; *Wemple v. Stewart*, 22 Barb. 154; *McCluskey v. Cromwell*, 11 N. Y. 593.) The theory that in some way the

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performance by the plaintiff's assignor of the condition to render services was prevented without fault on his part breaks down, if the testimony as to his misconduct was true, and the truth or falsity of this testimony could only be decided by the verdict of a jury. (Wood on Master & Servant, § 118; Schouler's Dom. Rel. [5th ed.], 371, § 462.)

John A. Straley for respondent. There was nothing in the case to be submitted to the jury on the alleged defenses of defendant. (*Caggar v. Lansing*, 64 N. Y. 417; *Corning v. T. I. & N. Factory*, 44 N. Y. 577; *Lomer v. Meeker*, 25 N. Y. 361; *Appleby v. A. F. Ins. Co.*, 54 N. Y. 253.) The question of whether the relations between Creamer and the company were such that the company could not reasonably be expected to accept his services was wholly immaterial to any of the issues as a matter of law on the facts. (*Caggar v. Lansing*, 64 N. Y. 417; *Neuendorff v. W. M. L. Ins. Co.*, 69 N. Y. 389.) The question of any breach of the contract on Creamer's part up to March thirtieth was finally adjudicated in the prior Supreme Court actions and concludes the parties hereto. (*Griffin v. L. I. R. R. Co.*, 102 N. Y. 452.)

BARTLETT, J. The plaintiff is the assignee of her husband, Henry Creamer, and seeks to recover in this action from the defendant, upon his written guaranty, certain royalties due to Creamer from the Safety Electric Construction Company, as licensee under letters patent owned by Creamer.

The facts in this case are somewhat complicated, but, when understood, the material ones are few and undisputed.

Creamer was the inventor of steam traps that were used in operating machinery.

In 1888 the defendant entered into a contract with Creamer whereby he obligated himself to aid the inventor in exploiting his patents, and, under certain conditions, to pay him various sums of money. The details of this agreement are not material.

On the 10th of July, 1890, an agreement was entered into between Creamer and the Safety Electric Construction Com-

pany, which will be hereafter alluded to as the company for the sake of brevity. The company at this time held the exclusive license for Creamer, under his patents, for the United States during the unexpired term thereof, and defendant was its president.

This agreement is lengthy, and many of its provisions are immaterial in this controversy. It released defendant from all liability under the agreement of 1888, and the corporation entered into certain covenants with Creamer. Defendant, at about the same time, guaranteed in writing the performance of a certain portion of the company's contract.

The company was to have the exclusive right to make, use and sell the patented inventions, and was to pay to Creamer one-fifth of the profits as a royalty, guaranteeing him not less than \$2,000 a year. He was to receive \$30 a week on account of such royalty, and devote his time and attention for three years or so long within that period as the weekly payments were promptly paid, and was to give his services, if required to do so by the company, as superintendent of construction and salesman.

If the company failed to pay the thirty dollars per week, on account of such royalty, Creamer, at his election, could serve a notice in writing on its president, and all rights and privileges secured to the company, after a lapse of sixty days, were to become his property, unless before the expiration of that time the company performed its defaulted obligations.

If the company desired to cancel the contract it had the right to do so on the first day of June in any year, after first paying the amounts due Creamer up to that date.

Defendant, in a separate instrument, guaranteed that the weekly royalty of thirty dollars should be promptly paid at the end of each and every week to Creamer, and in case it was not so paid he covenanted and agreed to make the payments himself.

This guaranty was to run for a period not longer than three years from its date, and only so long as the license remained uncanceled, and Creamer should continue as salesman and

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superintendent of construction of the company and render such services as provided in the contract, pursuant to the terms thereof.

This guaranty was to run from year to year, and could be terminated at the end of any year on the tender to Creamer of a reassignment of all his rights and interests in the patents.

These agreements went into effect in July, 1890, and Creamer received his royalties, with more or less regularity, up to the latter part of 1891.

On January 30th, 1892, \$225.00 of royalties remaining unpaid, Creamer served notice electing to cancel the contract in sixty days, unless its conditions were performed.

By letter dated the same day the company requested Creamer to deliver the keys of the safe and the office, with any other keys belonging to the shop in his possession; with this request Creamer complied.

On February 1st, 1892, Creamer went to the company's place of business, found the door locked, and was told by the person in charge, in substance, that he had been instructed not to admit him, and his services were no longer required. The following day Creamer's attorneys wrote the company a letter, reciting the facts, and in which it was stated as follows: "We take it that you desire to dispense with his services as superintendent of construction and salesman, and will so construe the action taken by you unless notified at once."

The company replied to this letter February 3d, and stated therein, among other things, as follows: "We shall hold Mr. Creamer responsible for the damage he has caused, and further contend that under the contract we can, if we choose, call upon him again at any time to act as superintendent or salesman."

On the 30th of March, 1892, the company tendered Creamer \$465.00, it being made within the sixty days allowed by the notice of forfeiture. This amount was afterwards, and on or about April 20th, 1892, sent to Creamer's attorneys in a check, which was receipted for by them as covering the royalties up to March 30th, 1892.

The present suit is to recover royalties under the contract

from the 30th of March, 1892, to the 10th of July, 1893, being the balance of the three years under the contract of guaranty.

On the 30th of March, 1892, the company began an action against Creamer for an accounting in the Supreme Court of the State of New York, and obtained an injunction restraining him from transferring any of the patents or forfeiting any of the company's rights under the contract pending the action.

On April 2nd, 1892, the company commenced another action in the Supreme Court against Creamer for an injunction restraining him from rescinding the contract. These two actions were tried together in December, 1892; the complaint in the first was dismissed, and in the second the injunction was granted.

There is no claim that the obligations of the contract between Creamer and the company were not in full force and effect as to the latter during the period covered by this action.

The learned counsel for the appellant uses this language in his brief submitted to this court: "We unhesitatingly admit that the company would have no defense to an action by Creamer or his assignee for the payment of the weekly royalty. Creamer was bound to render services only in case he was requested so to do. His rendition of services was not made a condition of the payment of the royalty as between him and the company."

The question is thus narrowed down to the contention upon which this appeal rests, that the guaranty was upon the express condition that it should be binding only so long as Creamer should continue as superintendent and salesman, and that the undisputed evidence shows that he ceased to be such before March 30th, 1892, and before any of the payments for which this action was brought became due.

It, therefore, becomes necessary to examine the provisions of the contract between Creamer and the company and those of the defendant's written guaranty. These two instruments must be read together, as the guaranty expressly refers to the terms of the main contract.

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The latter contains this provision : " And the party of the second part (company) covenants and agrees to and hereby does guarantee to said party of the first part (Creamer) that the royalty due and payable to him under and by virtue of said agreement shall amount at least to the sum of two thousand dollars per year during the continuance of this license and for the full term thereof, and that he shall be paid on account of said royalty thirty dollars a week, in weekly payments, at the end of each and every week, the balance due him in any one year to be paid him at the close of such year, or within one month thereafter," etc.

It further provides : " That the said party of the first part shall devote his time and attention, to the best of his ability, to the welfare of said enterprise, as superintendent of construction and salesman, if requested so to do by the party of the second part, in the business of manufacturing said inventions and developing the same, for the period of three years, or so long within the said three years as the guaranteed royalty herein provided to be paid him shall be promptly paid from the execution of this agreement, without further compensation than as herein provided by way of said guaranteed royalty of two thousand dollars per year, due and payable to him."

It will be observed that Creamer was not, in the ordinary sense, an employee of the company, but agreed that he would make the company his exclusive licensee under these letters patent, provided they paid him certain royalties, and as a part of that agreement he was, for a period not to exceed three years, if requested so to do, to render services to the company as superintendent of construction and salesman without further compensation. In this main agreement defendant is referred to as executing a guaranty of a portion thereof, which is described as annexed.

The material portion of the guaranty reads as follows : " And I further covenant and guarantee that the weekly guaranteed royalty of thirty dollars per week only, secured to the said Henry Creamer, in and by virtue of the foregoing agree-

ment between him and the Safety Electric Construction Company, shall be promptly paid at the end of each and every week to the said Henry Creamer, his executors, administrators and assigns; and in case the same is not promptly paid, I hereby covenant and agree for myself, my executors, administrators and assigns, to pay the same at the end of each and every week as therein provided. Said guaranty, however, to run in no event for a period longer than three years from date hereof, and from year to year only, and only so long as said license shall remain uncanceled, and said Henry Creamer shall continue as salesman and superintendent of construction of said party of the second part, and render such services as provided in said contract, pursuant to the terms thereof, within the said period of three years, and is to terminate at the end of any year provided for in the foregoing contract on the mere tender to said Henry Creamer of a reassignment," etc.

The appellant's claim is that the liability of the company is much broader than that of the defendant.

As already pointed out, it is conceded that the company would have no defense in a suit for the royalties now involved.

It is urged on behalf of the defendant that he was only liable to pay the royalty of thirty dollars per week, if the company defaulted, so long as Creamer continued as salesman and superintendent of construction; that he having been discharged by the company from those positions, there was no longer any liability under the guaranty.

The respondent argues that the clear reading of the guaranty imposes a broader liability, and we are of the same opinion.

The defendant's obligation was thus limited: "Only so long as said license shall remain uncanceled and said Henry Creamer shall continue as salesman and superintendent of construction of said party of the second part, and render such services as provided in said contract, pursuant to the terms thereof," etc.

The terms of the guaranty are clearly to this effect: That the defendant is liable if the license remains uncanceled and

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Creamer continues to render such services as salesman and superintendent as is provided in the contract.

The only services that Creamer was bound to render as superintendent and salesman were such as he was called upon by the company to perform. This is the plain reading of the main contract and the reasonable construction of the agreement of guaranty.

Creamer was entitled to his thirty dollars a week whether he rendered services as superintendent and salesman or not, provided the company did not see fit to call upon him. These services were essentially gratuitous, as they formed a part of the agreement which allowed the company to call upon him for these services if it saw fit without additional compensation.

The situation is briefly this: Creamer was to receive one-fifth of the profits as royalty, which the company guaranteed should not be less than two thousand dollars per year; the royalty was to be paid at the rate of thirty dollars per week in each and every week and the balance of it at the end of the year; the defendant's guaranty covered these weekly payments only.

This is the construction adopted by the court below, and it seems to us to be according to the letter and spirit of the instrument.

There is no claim that this license was canceled during the period involved in this action, or that Creamer was not always willing to act as superintendent and salesman if the company so requested.

The appellant's admission that the company would have no defense to this action practically concedes this point.

The alleged moral misconduct of Creamer is not material, in view of the fact that the company in its letter of February 3d, 1892, after having discharged Creamer and denied him admission to their place of business, stated to his attorneys, "We shall hold Mr. Creamer responsible for the damage he has caused, and further contend that under the contract we can, if we choose, call upon him at any time to act as superintendent or salesman."

The next day Creamer addressed a letter to the company wherein he returned to it his petty cash book and the balance of money on hand; he closed by saying: "I am, however, ready and willing to continue my services at your request pursuant to our contract. My address is 117 East Eighty-fourth street, New York City, and I will be glad to respond to any request you may make to continue my services."

We agree with the learned counsel for the appellant that the defendant is entitled to the application of the well-settled principle of law that a guarantor, like a surety, is bound only by the strict letter or precise terms of his contract and that the claim against him is *strictissimi juris*.

In view of the precise terms of the contract of guaranty, and the agreement to which it refers, and of which it is essentially a part, we are of opinion that the defendant is liable for the payment of the weekly royalty under the same terms and conditions precisely as the company is held.

It is true that the liability of the company is much broader than that of the defendant, as it must pay all the royalties, while the defendant is only required to pay the weekly royalty if the company makes default.

The judgment appealed from should be affirmed, with costs.

PARKER, Ch. J., O'BRIEN, HAIGHT, MARTIN, VANN and LANDON, JJ., concur.

Judgment affirmed.

DESMOND-DUNNE COMPANY, Respondent, v. FRIEDMAN-DOSCHER COMPANY, Appellant.

1. TRIAL—WITHDRAWAL OF INSTRUCTION TO JURY. An instruction to the jury, that they will find whether there is any substance to a defense or whether it is sham, may be treated as withdrawn, and not merely restated, when the judge, on his attention being called to it, says: "I withdraw that. I submitted the question whether it is a real, good, substantial defense or whether it was sham."

2. CONTRACT—SUBSTANTIAL PERFORMANCE. The right of a party to enforce a contract will not be forfeited by reason of inadvertent or unimportant omissions, but a substantial performance which will entitle him to recover may be made without a literal compliance as to all details.

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

3. ACTION ON PROMISSORY NOTES. An action on promissory notes, which are due according to their terms, and which were given as the consideration for advertising to be performed under a contract, will not be postponed until its completion, where there is no such provision in the contract and the notes are absolute in their terms.

Desmond-Dunne Co. v. Friedman-Doscher Co., 16 App. Div. 141, affirmed.

(Argued March 6, 1900; decided April 17, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 4, 1897, affirming a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

John T. Canavan for appellant. A new trial should have been granted because of the court's unwarranted characterization of the defense as "sham." (*Richardson v. Van Nostrand*, 5 N. Y. S. R. 419; *Butts v. Lorville*, 15 Wkly. Dig. 144; *Hart v. Ryan*, 25 N. Y. S. R. 886; *Phillips v. N. Y. C. & H. R. R. Co.*, 127 N. Y. 658; *Chapman v. Erie Ry. Co.*, 55 N. Y. 579; *Greene v. White*, 37 N. Y. 405.)

Jesse W. Johnson for respondent. The record presents no question on which the court can consider whether or not there was a substantial performance. (*Miller v. Benjamin*, 142 N. Y. 613; *Ringle v. W. I. Works*, 149 N. Y. 439.) A strict performance was not necessary to entitle the plaintiff to recover. (*Phillip v. Gallant*, 62 N. Y. 257; *Woodward v. Fuller*, 80 N. Y. 312; *Crouch v. Gutmann*, 134 N. Y. 51; *Flaherty v. Miner*, 123 N. Y. 382; *Miller v. Benjamin*, 142 N. Y. 613; *Ringle v. W. I. Works*, 149 N. Y. 441.)

BARTLETT, J. This action is brought to recover on three promissory notes for \$333.33 each.

A separate suit was brought on each note. One note was due May 1st, the next June 1st, and the last July 1st, 1896.

The defendant is a dealer in soap and the plaintiff is engaged in the business of displaying signs on the Brooklyn Elevated railway system, its cars, platforms and entrances.

These three suits were consolidated and tried as one.

The notes were given in payment on the contract for certain advertising to be done in a particular manner and at stated places.

The defendant alleged that the plaintiff had not complied with the terms of the contract, and claimed to be entirely relieved from the payment of the notes.

It is stated by the appellant's counsel that this was a unanimous decision of the Appellate Division. The judgment does not show that to be the fact, and the order of the Appellate Division is not in the record.

It appears in evidence that the number of signs called for by this contract was between fourteen and fifteen hundred, and the contest is confined to some twenty triangular signs that were about eight feet in length and two feet wide in the center, to be placed on canopies in both of the galleries leading to and from the bridge stations to the New York and Brooklyn bridge, ten signs to be placed in each gallery.

It was proved that after the contract was made the company decided to build new terminals connecting the road with the Brooklyn bridge, and the old galleries were torn down, remained in that condition some three or four weeks and afterwards rebuilt on new plans.

Under the original contract the signs were to remain up for six months from October 1, 1895, and a new memorandum was executed conforming the contract to the changed conditions and agreeing that the signs should remain up for six months from the completion of the stations.

According to the plaintiff's proof these twenty signs were put up in the temporary galleries and on what is known as the "Brighton Beach Terminal," and when the new work was completed ten signs were placed in each of the new galleries as required.

On all the material points in this case there is a sharp con-

flict in the evidence, and the jury having found for the plaintiff, it is to be assumed that they believed the story of its witnesses.

Under that state of facts and the charge of the learned court, the jury must be regarded as having found a substantial performance of the contract.

Several exceptions were taken to the charge of the court to the jury. The first is involved in this statement: "Gentlemen: You will determine from all the evidence in the case whether or not there is any substance in this defense or whether it is a sham defense."

When the court's attention was called to this, he said: "I withdraw that. I submitted the question whether it is a real, good, substantial defense or whether it was sham."

Defendant's counsel claims that this does not amount to a withdrawal, but was practically a restatement of the objectionable charge.

We are inclined to think that it may be treated as a withdrawal, and the statement of the court following the declaration "I withdraw that" was merely explanatory of what he intended in his original charge.

The next exception is based upon the statement to the jury, in substance, that they must consider all the facts in this case, many of which were enumerated by the judge, and determine whether the contract had been substantially carried out.

The defendant's counsel takes the position that this is a case where the law of substantial performance does not apply, and requested the court to charge the jury that a strict compliance with the contract is necessary to enable the plaintiff to recover. The court declined so to charge.

The right of a party to enforce a contract will not be forfeited by reason of inadvertent or unimportant omissions.

In this case the plaintiff was embarrassed by the terminal changes, over which neither party to this contract had any control, and the evidence tends to establish that the plaintiff did all it could, under the circumstances, to perform that part of the contract relating to the terminals and involving the twenty signs.

The rule is that a substantial performance must be established in order to entitle the party claiming the benefit to recover, but this does not mean a literal compliance as to all details. Undoubtedly, a willful or intentional departure would defeat recovery. (*Miller v. Benjamin*, 142 N. Y. 613; *Glacius v. Black*, 50 N. Y. 145; *Phillip v. Gallant*, 62 N. Y. 257, 264; *Woodward v. Fuller*, 80 N. Y. 315; *Heckmann v. Pinkney*, 81 N. Y. 211; *Dauchey v. Drake*, 85 N. Y. 411; *Van Clief v. Van Vechten*, 130 N. Y. 579; *Crouch v. Gutmann*, 134 N. Y. 51.)

The party for whom the work is to be done is protected as to any slight damage he may suffer by reason of failure to strictly perform the contract in every detail. This amount may be allowed him in a suit brought by the contractor, or he may bring a separate action. (*Phillip v. Gallant*, 62 N. Y. 256; *Flaherty v. Miner*, 123 N. Y. 382.)

The remaining point raised by the defendant is that no action would lie on these notes until the expiration of the six months during which the signs were to be displayed as agreed.

The contract contains no such provision, and the notes are absolute on their face.

One of the plaintiff's witnesses testified that there was no such arrangement.

It is to be borne in mind that this is not an action to recover such damages as were suffered by a substantial performance of the contract, leaving a certain portion unperformed, but the defense goes to the entire cause of action, and the claim is that there was such a failure to perform as to be a complete defense to the action on the notes.

There appears to be no reversible error in the rulings of the trial court, and the judgment appealed from should be affirmed, with costs.

PARKER, Ch. J., O'BRIEN, HAIGHT and LANDON, JJ., concur; MARTIN and VANN, JJ., dissent.

Judgment affirmed.

CAROLINE K. BRENNAN, Respondent, v. THE CITY OF BUFFALO,
Appellant.

1. TAX — ILLEGAL APPORTIONMENT OF ASSESSMENT. Where the assessors of the city of Buffalo for the purposes of general taxation divided a piece of real property into two parts and mapped it in that form, and the city comptroller apportioned the whole of a local assessment upon one part only and in that form sent it to the collector, who returned it without collection to the comptroller, who then discovered the error and corrected it by spreading the assessment upon the whole, instead of one part of the property, such action is a material departure from the provisions of the statute and permits the owner to question a sale of her property subsequently made by the municipal authorities for non-payment of the assessment.

2. UNAUTHORIZED ADDITION TO LEGAL ASSESSMENT REJECTED — EXCESS OF JURISDICTION. An addition made by such board of city assessors to a taxpayer's lawful and ratable assessment, to bring the total expense of a local improvement up to a sum which, under the charter of the city, would permit payment of it to be made in five annual installments, is an illegal and arbitrary act without authority or jurisdiction, but does not render the whole assessment void; and where the illegal part of such an assessment can be separated from the legal, the latter part may stand and be enforced, although the act of the assessors be characterized by the findings of the Special Term as "fraudulent."

3. FRAUD — BODY ACTING JUDICIALLY. A court or body acting judicially may commit an error or exceed jurisdiction, but it cannot be guilty of fraud in the proper or legal sense of the term.

4. ACTION TO SET ASIDE ASSESSMENT DISTINGUISHED FROM ONE TO SET ASIDE THE SALE. A provision of a city charter, barring an action to set aside, or test the validity or regularity of a tax or assessment unless brought within one year from the completion and delivery of the roll, does not apply to an action to set aside a sale of the property upon which the assessment was imposed.

5. RELIEF IN ACTION TO SET ASIDE SALE. Where the court has obtained jurisdiction of the parties and of the subject-matter in an action brought to set aside such a sale, it may, when setting the sale aside, afford complete relief, by striking from the roll a separate item added without jurisdiction to a valid assessment.

Brennan v. City of Buffalo, 13 App. Div. 458, reversed.

(Argued March 9, 1900; decided April 17, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered

February 3, 1897, affirming in part and reversing in part a judgment of the Superior Court of Buffalo reducing an assessment for taxes levied against plaintiff's land, setting aside a sale of the premises for the non-payment of such taxes and canceling the certificates of sale, entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

W. H. Cuddeback for appellant. The action of the assessors in arbitrarily increasing the amount of the plaintiff's assessment by the sum of \$581 did not render the whole assessment void. (*Curtis v. Leavitt*, 15 N. Y. 14.) The court had power to reduce the plaintiff's assessment by the amount in which the assessment had been arbitrarily increased. (High on Injunctions [2d ed.], § 497; Cooley on Law of Tax. [2d ed.] 429, 430; *Bank v. Kimball*, 103 U. S. 732; *N. P. R. R. Co. v. Clark*, 153 U. S. 252; *Gillett v. City of Denver*, 21 Fed. Rep. 822; *Kinsella v. Auburn*, 26 N. Y. S. R. 884; *Lilienthal v. City of Yonkers*, 6 App. Div. 138; *Matter of St. J. Asylum*, 69 N. Y. 353; *Matter of M. R. R. Co.*, 102 N. Y. 304; *Knapp v. City of Brooklyn*, 97 N. Y. 520.) The action of the comptroller in changing the assessment upon the plaintiff's lands, as described in the decision, did not render the sale void. (*Voght v. City of Buffalo*, 133 N. Y. 463; *Gilmore v. City of Utica*, 131 N. Y. 34; *Bell v. City of Yonkers*, 78 Hun, 196; *Knell v. City of Buffalo*, 54 Hun, 80; *Lyth v. City of Buffalo*, 48 Hun, 180.) The plaintiff's action, so far as it seeks to wholly set aside her assessment for the misconduct of the assessors, is barred by the Statute of Limitations. (L. 1880, ch. 275, § 9; *Bruecher v. Vil. of Port Chester*, 101 N. Y. 244; *Van Deventer v. Long Island City*, 139 N. Y. 133; *Townsend v. Mayor, etc.*, 77 N. Y. 542.)

Adolph Rebadow for respondent. The action of the assessors in arbitrarily increasing the amount of the plaintiff's assessment by the sum of \$581, rendered void the whole

N. Y. Rep.] Opinion of the Court, per O'BRIEN, J.

assessment roll, the court having found the assessors' acts, in that regard, fraudulent. (*Guckenheimer v. Angevine*, 81 N. Y. 397; *Masson v. Bovet*, 1 Den. 74; *Roosevelt v. Draper*, 23 N. Y. 318; *Curtis v. Leavitt*, 15 N. Y. 96; *C. C. Bank v. Payne*, 22 App. Div. 353; *Sanders v. Downs*, 141 N. Y. 422; *Hassen v. City of Rochester*, 65 N. Y. 516; *Ellwood v. City of Rochester*, 122 N. Y. 229; *Matter of N. Y. P. E. P. School*, 75 N. Y. 324; *Van Deventer v. Long Island City*, 139 N. Y. 133.) The court erred in assuming jurisdiction to reduce the tax. (*Poth v. Mayor, etc.*, 151 N. Y. 16.) The act of the comptroller in changing the assessment roll as against plaintiff's lands and assuming to distribute the assessment upon two parcels of land rendered the same null and void. (*Sanders v. Downs*, 141 N. Y. 422; *Matter of E. I. S. Bank*, 75 N. Y. 388.) The action is not barred by the Statute of Limitations. (Endl. Interp. Stat. § 343; *Chilcott v. City of Buffalo*, 7 N. Y. Supp. 638; *Zink v. McManus*, 121 N. Y. 259; *Sanders v. Downs*, 141 N. Y. 422.)

O'BRIEN, J. The plaintiff sought in this action to set aside a sale of her real property made by the municipal authorities upon an assessment for a local improvement. The complaint attacked not only the validity of the proceedings resulting in the sale, including the certificate given to the purchaser, but the assessment upon which it rested as illegal and void and a cloud upon her title. It is conceded, I think, that subsequent to the delivery of the assessment roll by the treasurer to the comptroller there were irregularities in the proceedings sufficient to justify the trial court in setting aside the certificate of sale and all the proceedings for that purpose subsequent to the transmission of the roll to the comptroller by the treasurer. It seems that subsequent to the assessment for this improvement the assessors, for the purpose of general taxation, divided the property in question into two parts and so represented it upon a map made for the use of the assessors. When the comptroller received the roll for this local assessment he apportioned the whole amount to one part of the

property and in that form it was sent to the collector and returned without collection to the comptroller again, who then discovered the error and corrected it by spreading the assessment upon the whole property instead of a part only. It is sufficient to say that in the proceedings for a sale there was a material departure from the provisions of the statute and it was open to the property owner to question the sale.

The most important question arises, not upon the proceedings resulting in the sale, but with respect to the validity of the assessment upon which the sale was based. If the assessment was void, as is claimed by the property owner, she was entitled to have that set aside as well as the sale. The facts that bear upon that question were all found by the trial court and are undisputed. The improvement consisted in the paving of a street. The common council had full power to order the work to be done and proceeded regularly. The expense of the improvement was fixed in accordance with the statute at \$19,420. It seems that, under the defendant's charter, when the expense of an improvement exceeds \$20,000 and is to be paid by local assessment the money is payable by the property owner in five annual installments. The finding of the trial court is that the assessors, in order to bring the assessment within the provision of the charter, at the instance and request of some person unknown, prepared the roll in the following manner: They first entered upon the roll against each parcel of property included within the district the proper sum or the ratable part of the whole expense as fixed according to law. Thus far they proceeded regularly, and their work was not affected by any jurisdictional or other error. But this distribution did not bring the total up to the required amount in order to come within the provisions of the charter referred to authorizing payment in five installments, and so the assessors, at the suggestion of some person not identified by the proofs, proceeded to add to the assessment on the plaintiff's property the sum of \$581, thus making the total just one dollar more than the limit in the charter. The trial judge characterized that act in the findings as "illegal, arbitrary and

fraudulent." He set aside the certificate of sale, the sale itself and corrected the assessment by striking out the item of \$581, awarding costs to the plaintiff. In so far as this judgment allowed the balance of the assessment to stand as a charge against the plaintiff's property, it was reversed at the Appellate Division and the entire assessment was set aside as void.

We think that the Special Term awarded to the plaintiff as large a measure of relief as she was entitled to upon the facts, and that the cancellation of the entire assessment by the court on appeal should not be upheld. The city had made and paid for the improvement, and the plaintiff's property has had the benefit of it. Under such circumstances a court of equity should not discharge the plaintiff's property from all liability to contribute to the expense unless compelled to do so in obedience to some established rule or principle. The use of the word "fraudulent" in describing the act of the assessors does not change the real character of that act. It was simply an act done without authority or jurisdiction, and was void upon its face without regard to the purpose in the minds of the assessors or the influences under which they acted. When the plaintiff asks a court of equity to relieve her property from all liability to contribute to an improvement which presumptively she has received the benefit of, she cannot impute fraud to the city simply because the assessors added to her assessment an item without authority. The assessment, when reduced by the Special Term, was a part of the assets of the city, and entitled to all the protection which the law gives to any other species of property. An illegal item in a local assessment does not necessarily render the whole assessment void because the act of inserting the item happened to be described as fraudulent. It frequently happens that public officers exceed their authority, but that will not always invalidate acts within their authority when the good and the bad can be separated. But I am not aware of any authority for imputing fraud to a municipality simply because one of its public officers exceeded his powers. When a board of assessors add to a lawful assessment an item which is unlawful, and

the latter can be separated from the former, the lawful part of the assessment can stand and be enforced even though the act of the assessors in adding the illegal item should be characterized as fraudulent. But even if fraud, as against a city, could in any case be predicated upon the act of the assessors in adding an illegal item to an assessment roll, it is plain that the learned judge who made the finding did not understand the term as imputing anything more than an excess of jurisdiction since he allowed the assessment to stand for the correct sum. It is plain that he did not understand that the whole assessment was infected with an incurable vice since he held it good except as to the item added without legal authority. The decision of the Special Term proceeded upon the rule so well stated by Judge Comstock in *Curtis v. Leavitt* (15 N. Y. 96) in these words:

“A doctrine which is expressed in the words ‘void in part, void in toto,’ has often found its way into books and judicial opinions as descriptive of the effect which a statute may have upon deeds and other instruments which have in them some forbidden vice. There is, however, no such general principle of law as the maxim would seem to indicate. On the contrary, the general rule is, that if the good be mixed with the bad it shall nevertheless stand, provided a separation can be made. The exceptions are: *First*. Where a statute, by its express terms, declares the whole deed or contract void on account of some provision which is unlawful; and *Second*. Where there is some all-pervading vice, such as fraud, for example, which is condemned by the common law, and avoids all parts of the transaction because all are alike infected.”

This was not a case in which the whole assessment was infected with an all-pervading vice. The use of the word *fraudulent* in the finding of the Special Term describing the assessment was doubtless an inaccuracy. The findings were probably drawn by the attorney for the successful party and not by the trial judge who had just decided to treat the original assessment, without the addition, as valid. The learned Appellate Division, we think, attached too much importance to that

word in the findings. It gave to a single word a meaning and significance which it is very evident the trial judge did not intend since he could not have held or found that the entire assessment was infected with a vice that rendered it utterly void. The use of that word in the finding did not change the undisputed facts or the true character of the official act of the assessors. It could have no application to that act so far as the assessors had jurisdiction. So far as they acted without jurisdiction the act was void whether described as fraudulent or otherwise, and the word was probably used only to characterize the excess which was added to an assessment otherwise valid. It frequently happens that even the judgments or orders of the courts are found to be void because the jurisdiction has been transcended, or illegal because affected by some error, but in any case the real character of the judicial act would not be changed by describing it as fraudulent. It is true that a judgment or decree may be fraudulent, but the fraud is never imputed to the court, but to the conduct of one of the parties. A court or body acting judicially may commit an error or exceed the jurisdiction, but it cannot be guilty of fraud in the proper or legal sense of that term. In this case the board of assessors acted judicially, and it would be just as impossible to impute fraud to their decision as it would be to the judgment of a court open to attack for jurisdictional defects or illegal procedure. Moreover, the assessors are not parties to this action. The parties to this action are the property owner and the city. The latter has neither perpetrated nor authorized any fraud upon the former. The plaintiff did not charge fraud in her complaint, and the mere fact that the word *fraudulent* is used in the finding to describe the act of the assessors, in association with the other words *illegal* and *arbitrary*, cannot affect the assessment when the illegal item of \$581 is expunged. This illegal item does not permeate the whole, but the good can be separated from the bad, and, after cutting off what was added without authority, the good can and should be upheld.

The learned counsel for the defendant contends that the

right to maintain this action is barred by a provision of the city charter to the effect that an action to set aside a tax or assessment or to test the validity or regularity of the same must be brought within one year from the completion of the roll and the delivery thereof to the treasurer. This action was not brought within that time. But it is not an action to set aside a tax or assessment or to test the validity or regularity of one. The primary purpose was to set aside a sale of the property upon which the assessment was imposed, and the action could rest upon the erroneous and irregular proceedings after the roll was delivered to the comptroller without touching the assessment at all. But the court having obtained jurisdiction of the parties and the subject-matter had power to make the relief complete by striking from the roll a separate item which had been added without jurisdiction to a valid assessment. The court, in removing a cloud upon the title to the property, created by an illegal sale, could extend the relief to everything that was found illegal, including the unauthorized item in the assessment. (*Zink v. McManus*, 121 N. Y. 259.)

If these views are correct, it follows that the judgment of the Appellate Division should be reversed, and that of the Special Term affirmed, without costs to either party.

PARKER, Ch. J., HAIGHT, MARTIN and LANDON, JJ., concur ; BARTLETT and VANN, JJ., dissent.

Judgment reversed, etc.

A. T. ALBRO COMPANY, Respondent, v. JOSEPH FOUNTAIN
et al., Defendants.

UNION DIME SAVINGS INSTITUTION, Appellant.

1. APPEAL — BY BANK IN CREDITOR'S SUIT TO REACH DEPOSIT. A bank which has paid out money, whether intentionally or by inadvertence, on a check presented pending a creditor's suit which the bank was defending and which involved the question whether or not the money had been transferred to the depositor by her husband in fraud of creditors, is entitled to a review, on its own appeal, of a judgment against it in favor of the creditor without any appeal by the depositor, since the bank is subrogated to her rights.

2. EVIDENCE — ADMISSIBILITY OF JUDGMENT AFTER REVERSAL. A judgment establishing fraud as to creditors, in a transfer of money from husband to wife and deposited by her in a bank, is not evidence of the fraud as against the bank on a second trial after reversal of the judgment on the bank's appeal although the wife failed to appeal.

3. EVIDENCE OF FRAUD AS TO CREDITORS — SUFFICIENCY TO SUPPORT JUDGMENT. A judgment finding that money deposited by a wife in a bank was transferred to her by her husband in fraud of his creditors is not sustained by a suspicion of fraud growing out of the marriage relation and evidence that shortly before she deposited the money her husband had sold some property, for which he received a somewhat larger sum, and by the fact that on supplementary proceedings she first testified that she owned all the money and on a later date testified that part of the fund belonged to a third person, who, on a still different date, testified that he had no interest in it, since her testimony, though suspicious, was not necessarily in conflict, because the rights in the fund might have changed between the different dates.

A. T. Albro Co. v. Fountain, 15 App. Div. 351, reversed.

(Argued March 8, 1900; decided April 17, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 23, 1897, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

C. N. Bovee, Jr., and *J. McG. Goodale* for appellant. The finding of the trial court as to the ownership of the \$700 on deposit with the Union Dime Savings Institution was without evidence to sustain it, and can be reviewed in this court. (Code Civ. Pro. § 1337; *Sickles v. Flanagan*, 79 N. Y. 224; *Kaplan v. N. Y. B. Co.*, 151 N. Y. 171; *Whiton v. Snyder*, 88 N. Y. 304; *J. C. Bank v. Townley*, 159 N. Y. 490; *Laidlaw v. Sage*, 158 N. Y. 73; *Constant v. University of Rochester*, 133 N. Y. 648; *Morris v. Talcott*, 96 N. Y. 100; *Shultz v. Hoagland*, 85 N. Y. 464.)

Eugene Frayer and *Robert Gibson, Jr.*, for respondent. The appellant has no standing to complain of or contest by appeal or otherwise the judgment appealed from. (*Baker v.*

N. Y. N. E. Bank, 100 N. Y. 31; *Dows v. Kidder*, 84 N. Y. 121; *Van Alen v. A. Nat. Bank*, 52 N. Y. 1; *Leitch v. Wells*, 48 N. Y. 585; *Jeffres v. Cochrane*, 48 N. Y. 671; *Lawrence v. Miller*, 86 N. Y. 131.) Aside from the question of the plaintiff's standing to complain of or contest the judgment, the judgment is right and must have been affirmed if the merits of the case were gone into. (Code Civ. Pro. § 191, subd. 3; *Otten v. M. Ry. Co.*, 150 N. Y. 395; *White v. Benjamin*, 150 N. Y. 258; *Loos v. Wilkinson*, 110 N. Y. 195; *Hall v. Naylor*, 18 N. Y. 588; *Miller v. Barber*, 66 N. Y. 558; *Mayer v. People*, 80 N. Y. 364.)

HAIGHT, J. The plaintiff, as judgment creditor of the defendant Joseph Fountain, brought this action to recover moneys which, it is alleged, belonged to the defendant Joseph Fountain, and had been by him transferred to his wife, Jean Fountain, in fraud of the rights of creditors and by her deposited in the Union Dime Savings Institution. After the commencement of this action the Union Dime Savings Institution was served with an order of the City Court requiring it to pay over the money on deposit in the name of Jean Fountain to the sheriff to apply upon a judgment recovered by one Perkins against her. Thereupon the bank, upon an affidavit of its treasurer, moved the City Court to set aside the order upon the ground that the plaintiff in this action had brought a suit claiming that the money on deposit belonged to Joseph Fountain, and that it would interpose an answer and defend the action in good faith. The City Court vacated the order, and the defendant put in an answer to the complaint in this action. Some days afterwards a deputy sheriff presented a check of Jean Fountain, accompanied with her bank book, to the bank, and the money on deposit in her name was paid over to him. The record does not disclose the circumstances under which the bank made the payment, and we, consequently, are unable to determine whether it was made through inadvertence or otherwise. The case afterwards proceeded to a trial, resulting in a judg-

ment in favor of the plaintiff, from which the bank has appealed. The Appellate Division appears to have reached the conclusion that the bank was to be treated the same as if it had not parted with the money, and as if its attitude was that of a disinterested holder of the money pending the litigation, and that, inasmuch as Mrs. Fountain had not appealed, the bank could raise no question for review on its appeal. We cannot approve of this disposition of the case. In so far as the question here presented is concerned, it matters not whether the bank paid over the money intentionally or inadvertently. The fact remains that the money was paid upon the check of Jean Fountain, and as soon as it was paid she ceased to have any interest in the subject-matter of the litigation. The payment by the bank did not relieve it from liability to the plaintiff, or in any manner impair or prejudice the latter's right to hold the bank liable for the money which it held at the time the action was brought; but, by the payment, the bank became subrogated to the rights of Jean Fountain, and assumed the responsibility of defending the action, and it could avail itself of such defenses as existed in her favor.

Upon the argument the respondent's counsel contended that, in case the judgment should be reversed and a new trial ordered, he could introduce the judgment roll, and by it conclusively establish upon the new trial the fraud alleged between Fountain and his wife; that neither of them having appealed, the judgment is conclusive upon them. However that may be, it would not be conclusive upon the bank, as we have recently determined in the case of *Commercial Bank v. Sherwood* (162 N. Y. 310).

We are thus brought to a consideration of the merits. The Appellate Division, having reached the conclusion that the bank had no standing in court to review the judgment, says in its prevailing opinion that it was unnecessary to consider the merits of the controversy. There was, however, a vigorous dissent, in which the claim was made that there was nothing in the testimony except a mere suspicion that because the parties were husband and wife the money which Jean depos-

ited in the bank was her husband's. Our examination of the evidence has led us to the conclusion that it does not support the judgment. Fraud must be proved; it must be based upon evidence. It cannot be established upon guesses or suspicions. Joseph Fountain had a restaurant. After several days' negotiation he finally sold it to one Engel, who gave him a check on the Nineteenth Ward Bank for \$750. This check was indorsed by Joseph Fountain, Lewis S. Marks and Eliza Ashcroft. To whom it was paid does not appear. It does not appear that it was ever paid, except as may be inferred from its subsequent presentation in court by Engel. The check was given to Joseph Fountain on the 18th day of May, and on the 20th day of May thereafter his wife Jean deposited \$650 in the defendant bank. This is all. There is no evidence showing that the \$650 came from her husband or from the proceeds of the check. When she was examined in supplementary proceedings instituted upon the judgment recovered against her by Perkins in the City Court, she stated that she had on deposit in the defendant bank \$700 and that it was her own property. When she was afterwards examined in supplementary proceedings upon the plaintiff's judgment, she testified that she was the owner of about \$300 of the fund on deposit and that the balance belonged to one Philip Reynolds. About a month later Reynolds was examined and stated that he did not claim any interest in the fund. While her testimony may create some suspicion it is not necessarily in conflict. She might have been the owner of the entire fund when she was first examined and afterwards transferred to Reynolds \$400, so that at the time she was examined in the second proceedings she was the owner of only \$300 of the fund, and during the ensuing month, before Reynolds was examined, he may have retransferred his interest in the fund to her. However this may be, it does not establish the fact that she derived the money from her husband. This is not a case where the finding is against the weight of evidence, but one in which there is an absence of evidence necessary to establish one of the essential features of the claim lying at the

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Statement of case.

foundation of the action, and as matter of law a recovery is not justified.

The judgment should be reversed and a new trial granted, with costs to abide the event.

PARKER, Ch. J., O'BRIEN, MARTIN, VANN and LANDON, JJ., concur; BARTLETT, J., dissents.

Judgment reversed, etc.

ANNETTE B. WETMORE, now ANNETTE B. MARKOE, Respondent, v. WILLIAM BOERUM WETMORE, Appellant, Impleaded with Others.

1. **APPEAL — REVIEW OF FINAL ORDER OR FINAL JUDGMENT AS TO ALIMONY.** A reversal by the Appellate Division of an order of the Special Term, granting an application to modify a decree for alimony by reducing the amount, is reviewable by the Court of Appeals, since it is either a final order in a special proceeding or a final judgment in an action.

2. **REVERSAL NOT STATED TO BE UPON THE FACTS.** An order of the Appellate Division reversing a decision on a motion to reduce an award for alimony must be presumed by the Court of Appeals, under section 1838 of the Code of Civil Procedure, to have been made upon the law, where the order does not contain any statement that the reversal was upon the facts.

3. **TRUST — INCOME DEVOTED TO SUPPORT OF WIFE OF BENEFICIARY — EFFECT OF DIVORCE AND SECOND MARRIAGE.** The income of a trust fund created by will for the benefit of testator's son cannot be devoted to the support of his wife, under a decree for alimony, after an absolute divorce in her favor, when she marries again and her husband's ability to support her is unquestionable.

Wetmore v. Wetmore, 44 App. Div. 220, reversed.

(Argued February 28, 1900; decided April 17, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, made November 14, 1899, reversing an order of Special Term, made at the foot of a judgment, granting defendant's motion to permit him to share in the income of a trust fund created by the will

162	508
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164	854
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162	508
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165	812
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162	508
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169	440
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162	503
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173	379
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173	395
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of his father, permission to so apply having been granted by the Court of Appeals, and denying a motion to amend the judgment accordingly.

The nature of the proceeding and the facts, so far as material, are stated in the opinion.

Thomas P. Wickes for appellant. The leave granted by the Court of Appeals to make this application was given without any condition whatever. (149 N. Y. 531.) The defendant's necessities require the appropriation of a portion of the income of the trust fund to his support. (*Francis v. Porter*, 88 Hun, 325.) Even if the defendant's present circumstances are not to be taken as admitted upon the pleadings, competent legal proof was offered by the adjudication of his bankruptcy and the sworn schedules accompanying his application. (*Michaels v. Post*, 21 Wall. 398; *Chapman v. Brewer*, 114 U. S. 158; *Shawman v. Wherritt*, 7 How. [U. S.] 627; *Matter of Van Orden*, 96 Fed. Rep. 86; *Halsted v. Halsted*, 21 App. Div. 466.) The conclusions of the referee were not binding upon the court. (*Marshall v. Meech*, 51 N. Y. 140; *Martin v. Hodges*, 45 Hun, 38; 2 Rumsey's Pr. 376.) The law of the case was correctly laid down and followed in the decision of the court at the Special Term. (*Wetmore v. Wetmore*, 28 N. Y. Supp. 377; *Wetmore v. Wetmore*, 79 Hun, 268; *Wetmore v. Wetmore*, 149 N. Y. 520; *Wetmore v. Wetmore*, 29 App. Div. 507; *Continental Trust Co. v. Wetmore*, 67 Hun, 9; *Bertles v. Nunan*, 92 N. Y. 152; *Moulton v. de ma Carty*, 6 Robt. 533.) This action is in equity to apportion a fund of which equity has sole jurisdiction. It is not an action in which the defendant can be punished for his alleged misdoings in the past. (*Moulton v. de ma Carty*, 6 Robt. 533; *Hann v. Vorhees*, 1 Law Bull. 65; *Stow v. Chapin*, 21 N. Y. S. R. 38; *Nichols v. Eaton*, 91 U. S. 727.)

Flamen B. Candler for respondent. The order appealed from is not an order which finally determines the action or a

special proceeding, or one which grants a new trial, and as the Appellate Division of the Supreme Court has not allowed the appeal or certified any question of law for review the order is not open for review in this court, and the appeal should be dismissed. (Code Civ. Pro. § 191.) The court should not grant any relief to the defendant William B. Wetmore until he shall return to this state and submit himself to the jurisdiction of the court and purge himself from his contempt in not complying with the judgment of divorce when he was able to do so. (*Wetmore v. Wetmore*, 79 Hun, 274.) No relief should have been granted to the appellant because he had not complied with the conditions on which he was permitted to renew his motion. (*Wetmore v. Wetmore*, 29 App. Div. 512.) The trial having been had before the referee, as directed by the order of the Appellate Division, and he having reported that the appellant was not entitled to any relief or to share in the income of the trust property, the plaintiff was entitled to a judgment on the report of the referee in accordance therewith. (*Paget v. Melcher*, 26 App. Div. 12; *Wetmore v. Wetmore*, 29 App. Div. 507.)

O'BRIEN, J. The record in this case is the concluding part of the history of a long and bitter controversy between husband and wife. The appeal is from an order of the court below reversing an order of the Special Term, which modified the last judgment entered, with respect to the payment of alimony by the defendant to the plaintiff. In order to get a clear view of the questions involved, it will be necessary to recall briefly the history of the litigation.

In April, 1892, the plaintiff obtained an absolute divorce from the defendant, dissolving the marriage and awarding to her the custody of the three children and alimony of \$3,000 per annum for her own use, and \$3,000 more per annum for the support of her children. The defendant failed to pay the alimony and went to reside in another state, remaining out of the jurisdiction of the courts of this state. The defendant's father, who died in 1885, made a provision by will for the

benefit of his son, whereby a fund of \$100,000 was created, the net income of which was to be paid to the defendant during his life. The plaintiff brought another action to which the trustee of the fund was made a party, for the purpose of procuring a judgment appropriating the income of the trust to the payment of the alimony accrued or to accrue. In this action she was successful, and the judgment in her favor was finally affirmed in this court. (149 N. Y. 520.) But as the judgment devoted the whole income of a trust for the defendant's benefit to the payment of the plaintiff's alimony, this court modified it by giving permission to the defendant to apply at any time in the future for leave to share in the income, or to have the award of alimony modified or reduced by a proper provision at the foot of the decree in the action. Since the entry of that judgment the income of the trust has been paid to the plaintiff. The decision of this court in that regard was based upon the assumption that the circumstances of the parties might be so changed in the future as to render it inequitable for the wife to absorb the entire income of the trust.

The defendant insists that this contingency has now happened, and this proceeding now before us was commenced to meet it. The defendant applied to the court below at Special Term for a modification of the judgment which appropriated the income of the trust to the payment of the plaintiff's alimony. In his affidavit bearing date July 11th, 1896, the history of the litigation is stated with considerable detail. There were two facts stated, however, that had a direct bearing on the application, namely, that he was then possessed of no property of any substantial value, and was without means of support, since the income of the trust had been diverted to the use of the plaintiff and the children, and that the plaintiff was not in need of the income for the reason that she had married a man of means, and was then on a visit to Europe with her new husband and the children. The defendant was then forty-six years of age, without a profession or any business capacity, he having graduated from West Point and

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spent his early life in the army. The court was requested to modify the judgment by reducing the allowance of alimony payable from the income of the trust to the \$3,000 awarded to the children, and providing for the payment of the balance, if any, to the defendant for his support.

The plaintiff, by her counsel, opposed the application in an affidavit recalling at considerable length what had appeared previously in the course of the litigation in regard to the defendant's pecuniary condition. The defendant's application was denied at the Special Term, but on appeal the order was reversed and the case remanded to the Special Term for another hearing. The appellate court appointed a referee to take the proofs and report the same to the court at Special Term, with his opinion. The order of reversal also directed the referee to treat the affidavits used on the previous motion as in the nature of pleadings and as a supplemental application to modify the judgment. It was said in the opinion that while the absolute denial of the motion was improper, it should not be granted upon affidavits without a trial of the issue where the witnesses must appear before the referee and submit to examination and cross-examination. (29 App. Div. 507.)

The referee made his report to the court, in which he found, among other things, that the defendant had been adjudicated a bankrupt in one of the district courts of the United States on the 13th of January, 1899; that the plaintiff, on November 22, 1894, was married to Dr. Markoe, of New York, who was in receipt of an income of about \$6,000 per annum; that the defendant had failed to appear before him for examination as to the facts stated in the affidavit, and that his application to share in the income of the trust fund should be denied. When the report was submitted to the Special Term it was treated as advisory merely, and not as conclusive, and the learned judge proceeded to examine the testimony and determine the facts, treating the affidavits as pleadings in an action upon an issue of fact wherein the allegations on each side not denied by the other side were

deemed to be admitted. It appeared from the proceedings reported by the referee that the defendant's counsel at the hearing offered to produce the defendant for examination and cross-examination if the plaintiff's attorney would stipulate that no attempt would be made to arrest him for non-payment of alimony or disobedience of the decree while in attendance, or in going to and returning from the place of the hearing ; but the plaintiff's attorney distinctly refused to enter into any such stipulation.

The court was of the opinion that the omission of the defendant under these circumstances to appear for examination before the referee was not conclusive against the application ; that while the plaintiff was under no obligation to enter into any such stipulation, yet it could not have deprived her of any advantage which she otherwise had, and that her refusal to make it, coupled with the absence of any denial of the defendant's statements as to his present financial condition, warranted the conclusion that she believed that a cross-examination of the defendant would not tend to disprove the allegations of his affidavit as to his financial condition. After a careful examination of the referee's report and the testimony contained in it, and of the moving and opposing affidavits, treating them as in the nature of pleadings, the Special Term granted the application, and determined that the judgment should be modified by reducing the amount to be paid from the income of the trust fund to \$3,000 for the children alone. The learned Appellate Division reversed this order upon the plaintiff's appeal, and it is from this order of reversal that the present appeal to this court was taken.

The learned counsel for the plaintiff insists that this court has no power to review the order. It certainly has if it is a final order in a special proceeding. Whatever it may be called, it is clear that it is a final determination of the proceeding, since it not only reversed the order of the Special Term, but denied the application. It was a proceeding instituted in pursuance of the provisions of the judgment in the action to sequester the income of the trust fund, based upon affidavits

on both sides that by the order of the court were given, in some sense at least, the effect of pleadings. The facts were the subject of a reference, and a report to the court upon which the order was made that has been reversed. It seems to me that the objection that it was not a special proceeding is without force. But if it was not a special proceeding, then it must have been a proceeding in an action, supplemental in character, to modify the judgment by provisions at the foot of the decree. If so, the final determination was a judgment, since it finally determined the rights of the parties. So that it must be either a final order in a special proceeding or a final judgment in an action. It is not very material to determine which, since either or both are appealable to this court.

Assuming, therefore, that we are required to review this order, it must be admitted that the Special Term had full power and jurisdiction to make the order that it did, granting the application. The motion called for the exercise of discretion upon the facts. The learned Appellate Division had power to reverse the order upon the facts and in its discretion deny the application. But, since the order does not contain any statement that the reversal was upon the facts or in the exercise of discretion, this court is required to presume that it was upon the law. (Code, § 1338.) So we must look at the order and proceedings of the Special Term for some error of law in order to sustain the reversal. It is quite obvious that there was no question of law before that court except the one hereafter considered but not referred to in either of the courts below. The questions actually considered were all questions of fact or of discretion. The decision of these questions was open to review on appeal, but the statute requires this court to presume that they were not reviewed, but that the reversal was upon some question of law.

The opinion of the learned court below indicates very clearly that it was convinced that the application should not be granted until the defendant returned from another state to the jurisdiction of the court and submitted to examination and cross-examination. The fact that the defendant has been

and is in contempt of the authority of the court has been a potent argument against him in this litigation, and, if this court had any discretion in the case before us, we would feel inclined to uphold the court below, within the limits of its power, in the enforcement of its authority and the defense of its own dignity. It is clear, however, that we must find some legal error in the decision of the Special Term before we can sustain the order appealed from, and obviously none can be pointed out.

But we think the record presents a question much broader and more important than any statutory rule for the disposition of appeals by this court, and, while it is a question of law, it tends to sustain the Special Term instead of the order appealed from. The judgment in this case appropriated the income of a testamentary trust made for the support of the defendant to the use of his wife and children after an absolute divorce. The defendant resisted the proceeding on the ground that what was proposed amounted to a violation of the terms and the purpose of the trust in his father's will. When the discussion of that question in this court and in the courts below is examined, it will be seen that the defendant's contention was answered by arguments based upon the unity of husband and wife and the obligation of the husband to support her and his children. While the defendant, by his misconduct, was adjudged to have forfeited all the rights growing out of that relation, the wife and children being innocent, still retained them all. It was said, in substance, that the testator, in constituting a trust for the benefit of his son, must have contemplated that it should also be for the benefit of his wife, should he marry, and his children, should any result from the marriage. This, we thought, was a reasonable and just view of the question presented. The plaintiff had not then contracted another marriage, or if she had, the record before the court did not disclose that fact. If the same facts appeared then that appear now, in the record before us, the line of argument in answer to the defendant's contention would have had little application. The relation of the parties to each other is now

completely changed. The unity of that relation, then existing, has been dissolved. The facts and circumstances upon which the judgment was rendered no longer exist. The question now is not whether the testator, in creating a trust for the benefit of his son, necessarily contemplated that his wife and children should share with him in the enjoyment of the income; but whether the plaintiff, who was once his wife and is now the wife of another man, shall continue in her new relations to share in that income. Unless the courts can, in reason and justice, hold that the testator contemplated such a disposition of his bounty, the income of the fund cannot now be diverted to that purpose without a plain violation of the trust. The protection and enforcement of such trusts, according to the spirit and intention of the founder, is one of the peculiar functions of a court of equity. We are not now concerned with the effect of a second marriage upon a decree awarding alimony generally. The only question we are now dealing with is, when and under what circumstances such alimony can be made a charge upon the income of a testamentary trust created for the benefit of the husband from whom the wife has procured an absolute divorce and remarried. Upon the plaintiff's marriage to her present husband she ceased to be, in any sense, the defendant's wife, and hence the reason upon which her right to share in the income of the trust rested ceased also. In contracting that marriage she became the wife of another man who, as it appears from the record, is abundantly able to support her. The contingency contemplated by this court, in modifying the judgment, has, therefore, happened, and after the second marriage the courts cannot devote the income of the trust fund to her support without diverting it to a purpose that could not have been contemplated by the testator.

Some incongruous results frequently follow with respect to alimony and property rights when the wife procures an absolute divorce from the husband, and it may be possible that, under certain circumstances and conditions, the wife may be entitled to support from two husbands at the same time.

But however that may be, we think that upon a second marriage of the wife to a husband whose ability to support her is unquestionable she ceases to have any claim in law or equity to the income of a trust fund created by will for a very different purpose.

For these reasons we are of opinion that the order appealed from should be reversed, and that of the Special Term affirmed, without costs to either party.

BARTLETT, J. (dissenting). We have here a defendant who is in flagrant contempt of the Supreme Court, and under its well-settled rule is entitled to no hearing or relief until he places himself in a proper attitude to ask it.

The order appealed from is not reviewable upon the facts in this court, for the technical reason that it does not state the reversal of the order of the Special Term was upon the facts as well as the law.

While it is true that we will not look into the opinion of the court below to ascertain whether the reversal was on the facts, nevertheless it is the practice of this court, in exceptional cases, to hold the appeal and permit the appellant to apply to the court granting the order to amend it, so as to show that the reversal was on the facts as well as the law, if such be the case.

I think the present appeal presents a very clear exception to our general rule, and that this order should be amended, as the opinion of the Appellate Division shows that the reversal was upon the facts, and for the additional reason that the requirement of the court respecting proof to be made before the referee of the changed condition of the defendant's circumstances was not complied with in any sense, "either technically or in spirit," as stated in opinion below.

The question as to what extent the income of a trust, created for the husband's benefit, can be devoted to the payment of alimony due from him to his divorced wife, after her second marriage, was not considered by the Special Term or the Appellate Division, and has not been argued at our bar.

A question of such importance, so far-reaching in its results, ought not to be determined without full argument and careful consideration. I am also of opinion that we should aid the Supreme Court in enforcing obedience to its mandates and vindicating its authority.

PARKER, Ch. J., HAIGHT, VANN and LANDON, JJ., concur with O'BRIEN, J., for reversal; BARTLETT, J., reads dissenting memorandum, and MARTIN, J., concurs.

Order reversed, etc.

M. TEMPLE TAYLOR, as Executor of ELIZA KENNER, Deceased,
Respondent, v. FREDERICK J. SYME, Appellant, Impleaded
with Others.

1. LEASE — REDUCTION OF RENT PRO TANTO — FORTUITOUS EVENT PREVENTING USE OF PREMISES. The inability of lessees to operate a plantation in Louisiana for the third year of their lease, on account of their financial failure and the fact that their creditors took possession of their movable property on the plantation, must be deemed to be the result of their own improvidence, and cannot be properly called a "fortuitous event" which will relieve them of the payment of rent *pro tanto* for the time they were deprived of the use of the premises, where the lease provides for such reduction for deprivation by a "fortuitous event," and the Civil Code of Louisiana defines this as "that which happens by a cause which we cannot resist."

2. ANCILLARY LETTERS TESTAMENTARY — JURISDICTION OF SURROGATE — COLLATERAL ATTACK. Ancillary letters granted by a surrogate in case of a will of personal property, upon a petition stating that the will was executed in Louisiana, while an accompanying transcript of the record of probate in Louisiana clearly shows that the will was executed in the state of Alabama, and that the testatrix resided in that state at the time of her death, are subject to collateral attack for want of jurisdiction, since the power of the surrogate, under section 2695 of the Code of Civil Procedure, to grant ancillary letters upon a foreign probate of a will of personal property made by a non-resident, is limited to the case of probate in the state or territory where the will was executed or where the testator resided at the time of his death.

3. FOREIGN EXECUTORS — POWER TO SUE IN THIS STATE. An executor appointed in Louisiana under Louisiana Revised Code (arts. 1220, 1668), for the professed purpose of carrying into effect on property in

that state a will made in another state, does not, by virtue of such appointment, become entitled to sue as such executor in the state of New York.

Taylor v. Syme, 17 App. Div. 517, reversed.

(Argued March 7, 1900; decided April 17, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 21, 1897, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court, and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Edward F. Brown for appellant. Both notes were barred by the Statute of Limitations. (Code Civ. Pro. § 390; Civil Code of La. art. 3459, 3505, 3528, 3540, 3541; *Hawes v. Welch*, 2 How. [U. S.] 507; 3 How. [U. S.] 465; 3 N. Y. S. R. 576; *A. & T. Co. v. Syme*, 51 U. S. App. 48; 168 U. S. 709; *Norton v. Sterling*, 15 La. Ann. 399; *N. O. C. Banking Co. v. Beard*, 16 La. Ann. 345.) The Surrogate's Court had no jurisdiction to issue ancillary letters. (Code Civ. Pro. § 2695; *Roderigas v. E. R. S. Inst.*, 76 N. Y. 316; *Nanz v. Oakley*, 60 Hun, 431; *Ferguson v. Crawford*, 70 N. Y. 253; *Matter of Hawley*, 104 N. Y. 250; *Riggs v. Cragg*, 89 N. Y. 479.) The so-called ancillary letters issued by the surrogate having been obtained by a false statement, the plaintiff never had a valid title to them, and his appointment was void *ab initio* and conferred no rights upon him. (*People v. Martin*, 91 Hun, 425; *Elliott v. Piersol*, 1 Pet. 328; *People ex rel. v. Hutton*, 18 Hun, 116; *Wilcox v. Jackson*, 13 Pet. 511; *Hickey v. Stewart*, 3 How. [U. S.] 750; *Shumway v. Stillman*, 4 Cow. 292; *Adams v. S. & W. R. R. Co.*, 10 N. Y. 328; *Kamp v. Kamp*, 59 N. Y. 212; *Ferguson v. Crawford*, 70 N. Y. 253; *Taylor v. Chamberlain*, 6 App. Div. 38.) Not having had his day in court, the defendant should have an opportunity in this action to attack the validity of

the decree of the Surrogate's Court, as it affects him only, and he was barred by statute from disputing the original application in the Surrogate's Court. (*Matter of Hodgman*, 82 Hun, 419.) Orphans', probate and similar courts are courts of special and limited jurisdiction, deriving their authority from statutes; and if it appear on the face of their proceeding that they have exceeded the authority given them by law, their orders and decrees are absolutely void and may be treated as nullities. (*White v. Riggs*, 27 Me. 114; *Cottles' Appeal*, 5 Pick. 483; *Sigourney v. Sibley*, 21 Pick. 101; *Gay v. Minot*, 3 Cush. 352; *Peters v. Peters*, 8 Cush. 529, 543; *Errors v. Smith*, 7 S. & M. 85; *Bloom v. Burdick*, 1 Hill, 130; *People v. Corless*, 1 Sandf. 228; *Hendrich v. Cleveland*, 2 Vt. 329.) The jurisdiction of any court exercising authority over a subject may be inquired into in every other court where the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceeding. (12 Am. & Eng. Ency. of Law, 308.) A judgment entered by a court without jurisdiction can be attacked collaterally and will be held void in such collateral proceedings. (12 Am. & Eng. Ency. of Law, 311; *Jones v. Jones*, 108 N. Y. 415; *Munson v. Munson*, 60 Hun, 189.)

Erastus D. Benedict for respondent. To enable the defendant to successfully plead the Statute of Limitations of the state of Louisiana as against either note, he must show that he resided in that state five years after the maturity of the note. (Civil Code of La. art. 3540; Code Civ. Pro. § 390; *Goldberg v. Lippmann*, 55 N. Y. S. R. 513; *Beer v. Simpson*, 65 Hun, 20; *Bean v. Tonnele*, 94 N. Y. 381; *Clark v. L. S. & M. S. R. Co.*, 94 N. Y. 217; *Howe v. Welch*, 17 Abb. [N. C.] 397; *Smith v. Crosby*, 2 Tex. Rep. 414; *Sloan v. Waugh*, 18 Iowa, 222; *Patchell v. Hopkins*, 19 Iowa, 531.) The surrogate had jurisdiction to issue ancillary letters. (*Crum v. Bliss*, 1 Law Bull. 68; *Sullivan v. Fosdick*, 10 Hun, 173; *Burs v. Shannon*, 73 N. Y. 292; *Haywood v. Place*, 4 Dem. 487; *Brown v. Landon*, 30 Hun, 57;

Roderigas v. E. R. S. Inst., 63 N. Y. 460; 76 N. Y. 316; *Caulfield v. Sullivan*, 85 N. Y. 153; *Parsons v. Lyman*, 20 N. Y. 103; *Doolittle v. Lewis*, 7 Johns. Ch. 49.)

LANDON, J. This action was commenced by Eliza Kenner, Sept. 3, 1890, against the defendant Syme, upon two promissory notes made Dec. 21, 1892, in New Orleans, Louisiana, each for \$1,500, by Allen and Syme, copartners, then residents in New Orleans, to their own order, one payable Aug. 1, 1885, and the other Sept. 1, 1885, and indorsed by the makers to Eliza Kenner, who then resided and continued to reside until her death in Mobile, Alabama. The notes were the last of a series given in payment of the rent of a rice plantation in Louisiana, which Mrs. Kenner, at the time of their date, leased to Allen and Syme for three years ending December 31, 1885. The lease contained a provision that if the lessees should be deprived of the use of the premises by and through any causes beyond their control, or any fortuitous event, they should be allowed a reduction of the amount *pro tanto*.

Allen and Syme entered into possession of the premises and at the end of two years failed, and their creditors took possession of their movable property on the plantation, with the result that they did not operate the plantation the third year. We agree with the courts below that Allen and Syme must be held to have brought this misfortune upon themselves by their own improvidence, and that it could not be properly called a "fortuitous event," which the Civil Code of Louisiana defines as "that which happens by a cause which we cannot resist."

Eliza Kenner died in the state of Virginia in July, 1891, but her domicile was in Mobile, in the state of Alabama. This action was revived in the name of the present plaintiff in October, 1896, ancillary letters testamentary having in September, 1896, been issued to him by the surrogate of the county of New York. The defendant, by his answer and upon the trial, challenged the jurisdiction of the surrogate of the county of New York to issue the ancillary letters, the

ground of the challenge being that such letters were issued upon the record of the probate of Mrs. Kenner's will, and of the issue of letters testamentary thereon by a court in the state of Louisiana, where she did not live, where she did not die, and where her will was not executed, instead of by a court in the state of Alabama, in which she was domiciled at the time of her death, and in which she executed her will.

Section 2695 of the Code of Civil Procedure limits the power of the surrogate to grant ancillary letters upon a foreign probate in the case of a will of personal property made by a person who resided in some other state or territory of the Union at the time of the execution thereof, or at the time of his death, to the case of probate in the state or territory where the will was executed, or the testator resided at the time of his death.

In August, 1896, the present plaintiff, M. Temple Taylor, by his attorney, presented a petition to the surrogate of the county of New York for ancillary letters testamentary, ostensibly under section 2695 of the Code of Civil Procedure. The petition stated correctly the facts, except that it stated that the will was executed in Louisiana, which was not true. Accompanying the petition was a duly certified transcript of the record of the probate of the will in the court in Louisiana, and of letters testamentary issued to the plaintiff, with a copy of the will, and proofs including a statement of the testimony of the subscribing witnesses, substantially as required by sections 2695, 2698, 2704. From this transcript it distinctly appeared that the will of Mrs. Kenner was executed in the state of Alabama, and that she resided in that state at the time of her death, that is, had her domicile there. It thereby appeared that the case was not one in which the surrogate had jurisdiction to issue ancillary letters upon the transcript of the record of the probate and proceedings produced before him from the court in Louisiana. The surrogate was probably diverted from examining the record before him by the statement in the petition that the will was executed in Louisiana. But the office of the petition was to institute the proceeding

and bring the Louisiana record into court for examination by the surrogate. Manifestly, if the petition contradicted the record upon a jurisdictional fact, the record should prevail, since one of the purposes of the provisions of the Code of Civil Procedure in this behalf is to give full faith and credit in proper cases to judicial proceedings of a sister state. No mistake in the petition would create the record of a probate in Alabama or change the facts presented by the Louisiana record that the testatrix executed her will in Alabama and was domiciled there at her death. The record showed that the surrogate had no jurisdiction. (*Riggs v. Cragg*, 89 N. Y. 479; *Matter of Hawley*, 104 N. Y. 250; *Morrow v. Freeman*, 61 N. Y. 515; *Matter of Catholic Protectory*, 77 N. Y. 342.)

It is suggested that, however this may be, the plaintiff was duly appointed executor in Louisiana, and thus became the owner of the assets of the deceased. This position would have more force if Louisiana had been the domicile of the testatrix, since the law of the domicile governs the succession of personal property. The rule still remains that a foreign executor or administrator cannot sue as such in this state, although in cases where there are no creditors of the decedent within the state the reason of the rule has little force. (*Parsons v. Lyman*, 20 N. Y. 103; *Petersen v. Chemical Bank*, 32 N. Y. 21; *Toronto Gen. Trust Co. v. Chicago, B. & Q. R. R. Co.*, 123 N. Y. 37.) The administration in the state of Louisiana, however, was under the Revised Code of that state as follows:

"Art. 1220. The succession of persons domiciled out of the state of Louisiana and leaving property in this state at their demise, shall be opened and administered upon as are those of citizens of the state, and the judge before whom such succession shall be opened shall proceed to the appointment or confirmation of the officer to administer it under the name and in the manner pointed out by existing laws."

"Art. 1668 (1681). Testaments made in foreign countries and other states of the Union cannot be carried into effect on

property in this state without being registered in the court within the jurisdiction of which the property is situated, and the execution thereof ordered by the judge."

Thus, the professed purpose of the administration in Louisiana was that the will of the testatrix might "be carried into effect on property in this (that) state." It did not purport to extend to the property of the testatrix in the state of her domicile or in any other state, or to be a universal administration, but to cover the administration in that state, like the ancillary administration sought in this state, the ancillary being supplemental to the principal administration, and, except as to domestic creditors, subordinate to it. (See sec. 2700, Code C. P.)

It is said that this is a collateral attack, but as it is a question of the jurisdiction, the attack can be made collaterally. The defendant had no interest in the proceeding or standing to challenge it until the plaintiff asserted against him his right to represent Mrs. Kenner. He could do no more than raise the issue at his first opportunity.

The defendant also urges the Statute of Limitations of Louisiana as a defense. The Appellate Division held that it was not well taken, because the defendant took up his residence in this state before the expiration of five years after the maturity of the note. The question is an interesting one, but it is not necessary for us to decide it.

It follows that the plaintiff did not show his right to maintain this action.

The judgment must be reversed, with costs; new trial granted, costs to abide the event.

PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN and VANN, JJ., concur.

Judgment reversed, etc.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
JAMES O. SMITH, Appellant.

1. ARSON — EVIDENCE. The evidence in a case of arson examined and held that it tended to support a finding that the fire was of incendiary origin.

2. WITNESS — CORROBORATION. Where, upon a trial for arson, the theory of the prosecution is that the fire was the result of a family conspiracy to burn buildings and defraud insurers, and evidence is given that they removed articles of personal property before the fire and subsequently included them in the proofs of loss, the testimony of a principal female witness for the prosecution as to the identity of such articles cannot be corroborated by another witness' statement that she pointed them out to him as being the same as those mentioned in the proofs of loss, or, in effect, that she told him the same story out of court that she subsequently testified to on the trial.

3. EVIDENCE — IMPROPER ASSUMPTION OF EXISTENCE OF CONSPIRACY. Upon such a trial the court cannot properly allude to a prior trial and conviction for the same offense of one of the alleged conspirators and assume the existence of a conspiracy for the purpose of admitting evidence of the acts and declarations of another alleged conspirator in the absence of defendant, and the reception of such evidence is reversible error.

4. IRRELEVANCY OF EVIDENCE AS TO FAILURE TO PAY PROMISED WAGES. A witness for the prosecution, a former servant of the family, who has given important testimony as to the articles mentioned in the proofs of loss, but not destroyed by the fire, cannot be permitted to testify that he was not paid by them his agreed wages, as such evidence might be grouped with other evidence in the case tending to disparage the methods and moral character of the family, and its reception is prejudicial error.

5. INSTRUCTION AS TO HYPOTHESIS OF GUILT — IMPROPER QUALIFICATION OF REQUESTED CHARGE. The refusal to grant a requested charge that the evidence, in order to convict, must be so strong as to remove every other hypothesis than that of the defendant's guilt, followed by a charge that "it must be sufficient to remove every reasonable hypothesis," is error, because the jury may have understood that the evidence need not be so strong as to remove to a moral certainty every other hypothesis than that of the defendant's guilt or every reasonable hypothesis of his innocence.

6. IMPROPER STATEMENT OF DISTRICT ATTORNEY. A statement by the district attorney in his opening that he would show, if permitted, that

several other buildings owned by the mother and family of the defendant and other buildings which he had assisted in erecting or was interested in were destroyed in a similar manner, with an incomplete statement as to what had happened within less than a year before the fire, which he refrained from finishing after an objection was taken but overruled by the court, constitutes prejudicial error, since the jury, after the court overruled the objection, may have understood that the district attorney was speaking within proper limits and may have inferred that they were dealing with an old offender.

People v. Smith, 37 App. Div. 280, reversed.

(Argued February 28, 1900; decided April 17, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered February 11, 1899, affirming a judgment of the Monroe County Court convicting the defendant of the crime of arson in the first degree, and an order denying a motion for a new trial.

The defendant was jointly indicted with his father, James Smith. The indictment contained two counts. The first count charged arson in the first degree, in that the defendant and James Smith did on the 6th day of December, 1894, in the town of Greece, Monroe county, unlawfully set on fire and burn in the night time the building and hotel commonly known as the Half Way House of Frances M. Smith, the same being a dwelling house where at the time there was no human being, and six other buildings of the said Frances M. Smith, the first adjoining the Half Way House and the second adjoining the first, and the third the second, and so on, also four other adjoining buildings belonging to other persons. Only one act of arson was charged. The second count charged arson in the third degree by charging the defendant and James Smith with unlawfully and feloniously setting on fire and burning the same buildings of Frances M. Smith at the place and on the date above named, except the charge that it was in the night time was omitted, and the charge added that the buildings were insured, the intent being to prejudice the insurers thereof.

P. Chamberlain for appellant. The defendant's demurrer to the indictment should have been sustained. (Penal Code, §§ 487, 488; *Woodford v. People*, 62 N. Y. 117; *People v. Wright*, 9 Wend. 193; *People v. Taylor*, 3 Den. 98; *Reed v. People*, 1 Park. Cr. Rep. 481; *People v. Upton*, 38 Hun, 107; *People v. O'Donnell*, 46 Hun, 358; *People v. Tower*, 135 N. Y. 457.) The court erred in overruling the defendant's challenge for implied bias of Andrew H. Brown and Henry P. Todd, thereby compelling the defendant to exhaust two of his peremptory challenges. (*People v. Wilmarth*, 156 N. Y. 566; *Halstead v. M. Ry. Co.*, 32 N. Y. S. R. 109.) The opening of the district attorney to the jury was improper, and the defendant's objection should have then and there been sustained and the counsel corrected by the court. (*Halpern v. N. E. R. R. Co.*, 16 App. Div. 90; *Chapman v. E. Ry. Co.*, 55 N. Y. 579; *McKenna v. People*, 81 N. Y. 360.) The court committed numerous errors in the reception of incompetent evidence prejudicial to the defendant. (*People v. Corey*, 157 N. Y. 332; 148 N. Y. 476; *Lambert v. People*, 6 Abb. [N. C.] 181; *People v. Altman*, 147 N. Y. 473; *Stokes v. People*, 53 N. Y. 164; *People v. Wood*, 126 N. Y. 249; *People v. Strait*, 154 N. Y. 165; 1 Greenl. on Ev. 111; 3 Greenl. on Ev. 94; *People v. McQuade*, 110 N. Y. 284; *People v. Kief*, 126 N. Y. 661.) The court erred in refusing to grant defendant's motion to strike out the testimony of the witnesses Bidwell, La Violette and La Flamme, and all the testimony relating to conversations and transactions had with James Smith, Frances M. Smith and Emma Smith, not in the presence of the defendant. (*Clark v. Dillon*, 97 N. Y. 370; *People v. Stark*, 59 Hun, 55.) The motion to direct a verdict of acquittal at the close of the People's case should have been granted and the exception to the court's refusal is well taken. (*Stokes v. People*, 53 N. Y. 183; *People v. Williams*, 29 Hun, 520; *People v. Thompson*, 21 Wkly. Dig. 345; *People v. Van Houter*, 38 Hun, 168; *Shepherd v. People*, 19 N. Y. 537; Best on Presumptions, § 210; *People v. Kelly*, 37 Hun, 160;

People v. Humphrey, 7 Johns. 314; *People v. Bennett*, 49 N. Y. 137; *People v. Owens*, 148 N. Y. 648.) There was a fatal variance between the proofs and the allegations of the indictment. (*People v. Dumar*, 106 N. Y. 502.) It was error for the court to permit the district attorney, upon cross-examination, to go into the relations of the defendant with one Barbara Ruff. (*People v. Corey*, 148 N. Y. 476; *Hutchins v. Hutchins*, 98 N. Y. 56; *Jackson v. Osborn*, 2 Wend. 555; *People v. Gay*, 7 N. Y. 378; *People v. Fitzgerald*, 156 N. Y. 253.) The verdict of the jury was against the evidence, and defendant's motion for a new trial upon the minutes should have been granted. (*Clark v. Dillon*, 97 N. Y. 370.)

S. J. Warren for respondent. The indictment is not bad for duplicity, and the defendant's demurrer was properly denied. (*Woodford v. People*, 62 N. Y. 117; *Taylor v. People*, 12 Hun, 217; Code Crim. Pro. §§ 285, 684; *People v. Shorter*, 2 N. Y. 193; 1 Colby Crim. Law, 267, 268; *People v. Buddensieck*, 103 N. Y. 496; *People v. Dimick*, 107 N. Y. 29; *People v. Clements*, 107 N. Y. 210; *People v. Weldon*, 111 N. Y. 575; *People v. Willett*, 102 N. Y. 253.) There was no error in the court overruling the defendant's challenge for implied bias of Andrew H. Brown and Henry P. Todd. (*People v. Wilmarth*, 156 N. Y. 569.) The remarks of the district attorney in his opening were proper. (*People v. Greenwall*, 108 N. Y. 296; *People v. Shea*, 147 N. Y. 79; *People v. McKane*, 143 N. Y. 455; *People v. Murphy*, 135 N. Y. 450; *Hope v. People*, 83 N. Y. 418; *People v. Peckens*, 153 N. Y. 576; *People v. McLaughlin*, 150 N. Y. 365; *People v. Van Tassel*, 156 N. Y. 561; *People v. Place*, 157 N. Y. 598.) No error was made by the court in the reception of evidence. (*People v. McQuade*, 110 N. Y. 284; *People v. Murphy*, 3 N. Y. Cr. Rep. 338; *People v. Kief*, 126 N. Y. 661.) The refusal of the court to grant defendant's motion to strike out the testimony of the witnesses Bidwell, La Violette and La Flamme, and all the testimony relating to conversations and

transactions had with James Smith, Frances M. Smith and Emma Smith, not in the presence of defendant, was proper. (*People v. McKane*, 143 N. Y. 455; *People v. Wicks*, 154 N. Y. 766; 11 App. Div. 539; *People v. Peckens*, 153 N. Y. 576; *People v. Willis*, 54 N. Y. Supp. 129.) There was no variance between the proofs and the allegations in the indictment. (*Woodford v. People*, 62 N. Y. 117.) The district attorney was properly allowed upon cross-examination to go into the relations of the defendant with Barbara Ruff. (*People v. Eckert*, 2 N. Y. Cr. Rep. 470; *People v. Irving*, 95 N. Y. 541; *Ryan v. People*, 79 N. Y. 594; *People v. Noelke*, 94 N. Y. 143; *People v. Tice*, 131 N. Y. 651; *People v. Webster*, 139 N. Y. 73; *People v. Dorothy*, 156 N. Y. 237.)

LANDON, J. 1. In view of the lack of unanimity in the affirmance by the Appellate Division of the judgment of conviction, we have examined the record to ascertain as a question of law whether there is evidence tending to support the verdict. The single question in this part of our investigation is whether there is evidence tending to support the finding that the fire was of incendiary origin.

The fire broke out about two o'clock in the morning of December 6th, 1894, in the Half Way House, a building belonging to Mrs. Frances M. Smith, situate on the Boulevard in the town of Greece, Monroe county. The building was occupied by James Smith, the father of the defendant, as a hotel, but at the time of the fire the business done in the building was very slight, and had practically ceased. The defendant spent the night of the fire at the house of his sister, Emma Smith, on Meigs street in the city of Rochester, about three miles away from the Half Way House. James Smith and his servant, Thomas Bidwell, and a carpenter named La Flamme in his employ, sat around a small stove in the bar-room during the evening before the fire and until about midnight, when they together left the building, and all of them went to the Electric Cottage, so called, directly across the

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street, where the senior Smith and his wife, Frances M. Smith, the mother of the defendant, resided. Two hours later the senior Smith gave the alarm of fire. He was then in the street, clothed in his usual manner. The fire appeared to be in a bedroom in the second story. There is no direct evidence of any combustible materials there, or showing how the fire originated. The jury seem, in view of the circumstances, to have inferred that the senior Smith went in there and kindled it, and then gave the alarm. The fire extended and consumed eleven buildings. Seven of these buildings belonged to Mrs. Smith, the mother of the defendant. They were insured in various companies. There is evidence that the buildings, or some of them, were constructed by the defendant and his father of cheap materials and by low-priced labor, and that the insurance companies settled the losses for less than the face of the policies, but no other evidence that they were insured for more than their value. The contents of the Half Way House and the store adjoining were also insured. Evidence was given tending to show that shortly before the fire the defendant, his father and mother removed from these buildings most of their contents, and that after the fire they with their sister co-operated in making proofs of loss in the name of defendant's mother in which these removed articles, and some others that were never in the buildings, were inserted as destroyed. There was also evidence to the effect that the defendant and his father in conversing with each other made some remarks susceptible of a construction that a fire would occur, and after the fire that the defendant made some remarks indicating a desire to suppress information about the fire. The theory of the People was that the defendant, his father, mother and sister Emma, before the fire, entered into a conspiracy to burn the Half Way House and store and defraud the insurance companies afterwards, and that the Half Way House was set on fire in pursuance of this conspiracy. Of course, the fire might have been accidental, or the work of some unknown incendiary, and the conspiracy to defraud the insurance companies, if such there was, have been formed after the fire,

But we cannot say that there was no evidence tending to support the finding that the fire was of incendiary origin. The evidence also tends to show that the defendant, although absent at its origin, aided and abetted, counseled and induced his father to commit the act, and thus to convict the defendant as a principal. (Penal Code, section 29.) The competency of some of this evidence is challenged.

2. A Miss La Violette was the principal witness on the part of the People to prove the incriminating remarks of the defendant and his father, the removal by the defendant, his father and mother of the personal property from the Half Way House before the fire, their co-operation with each other and his sister in making the proofs of loss after the fire, and the inclusion in the proofs of loss of the removed articles and others not destroyed. Her history of herself and of her relations with the Smiths tended to impair her credibility.

The People placed the proofs of loss of the personal property in the Half Way House and store in evidence and then called Miss La Violette. She testified that some of the articles mentioned therein were removed from the house before the fire and taken to the house of Emma Smith in Meigs street, Rochester, and others to the Electric Cottage, a house occupied by the Smiths on the opposite side of the street from the Half Way House, and she specified the articles. In doing this she responded mainly to questions asked by the district attorney as he read from the proofs of loss, one article after another named therein. She then testified that some time after the fire she went with Officers Muir and Hawley down to the Electric Cottage and saw the articles, and she there pointed out and identified in the presence of the officers some of the property that had been in the Half Way House and store. She also testified that she went with them to the house on Meigs street, and that some of the articles named in the proofs of loss were there, but she did not testify that she pointed out any of the articles to the officers.

The People then called Officer Muir, who testified that he went with Miss La Violette to the Smith house, on Meigs

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street, and that she there pointed out to him many articles, of which he produced the list, and the defendant's objection to its competency being overruled and the defendant excepting, he further testified that she identified all the property with the exception of some books as coming from the Boulevard, that is, from the Half Way House and store. In like manner, under like objection and exception, the officer testified that Miss La Violette, on the same day, pointed out to him at the Boulevard several articles of the like kind named in the proofs of loss.

It was competent for the officer to enumerate the articles he saw at the house in Meigs street and down at the Boulevard, and to describe them. Such evidence might assist the jury in identifying the articles with those set forth in the proofs of loss. But it was not competent for him to testify that Miss La Violette identified the articles, or pointed them out to him, as the same mentioned in the proofs of loss. In effect, his testimony was that she told him the same story out of court that she had testified to in court. Officer Muir's testimony as to her acts and declarations was not competent to support her testimony as to the identity of the articles with those in the proofs of loss; but when adroitly adduced under the sanction of the court it might seem to the jury to be a conclusive corroboration, and they might believe, as they probably did, that, as she was thus corroborated in this particular, she probably told the truth in other important particulars as to which she was contradicted or her truthfulness challenged.

3. Miss La Violette was also permitted, over the defendant's objection and exception, to testify to the acts and declarations of Mrs. Frances M. Smith, the mother of the defendant, in his absence, on the day before the fire, tending to show, in connection with the subsequent fire, her removal of some articles from the Half Way House in anticipation of the fire. In overruling the defendant's objection the trial court said: "Received, because I suppose the evidence will follow up the same line it did in the other case (meaning the trial before the same court of the defendant's father upon the same

indictment, upon which he was convicted, which trial and conviction were sufficiently alluded to upon this trial to enable the jury to understand the reference made by the court), and there is no doubt in my mind but there was evidence to go to the jury on the question of conspiracy between all these people."

Thus the court assumed, for the purpose of receiving the testimony, the existence of a conspiracy, not upon the evidence adduced in this case, but upon evidence alleged by the court to have been received in another case, which was quite satisfactory to the mind of the court. What the evidence was in the other case we do not know; whether the same was afterwards given in this case we do not know. That case and the evidence of a conspiracy in it were irrelevant and incompetent here, but, nevertheless, they were cast into the scale to the prejudice of the defendant, enhanced in influence by the declarations and approval of the court, the true weight and merit of which the jury had no other means of determining and were not at liberty to know. (*People v. Corey*, 157 N. Y. 332.) Moreover, there is no direct evidence that the fire was of incendiary origin. The remarks of the court, assuming that the jury knew of the conviction of defendant's father, tended to ease their minds of scruples on that score.

4. Thomas Bidwell was a witness for the People. He lived with the Smiths at the time of the fire. He was about fifty years old, was a cripple, and, before accepting the protection and entering the service of the Smiths, he had lived and wandered with the gypsies. After the fire he seemed to have fallen under the influence of Miss La Violette, and he gave important testimony as to the articles mentioned in the proofs of loss but not destroyed by the fire. He testified, over the objection and exception of the defendant, that the Smiths promised to pay him ten dollars per month, but never paid him. This was error. Other testimony as to which the defendant's objection to its irrelevancy was, perhaps, properly overruled, tended to disparage the methods of the Smiths, and thus their moral character, and makes it clearer that this

testimony of Bidwell, which could be grouped with the other, was prejudicial to the defendant.

5. The defendant requested the court to charge: "That before the jury can convict this defendant the evidence must be so strong as to remove every other hypothesis than that of the defendant's guilt.

"By the court: I decline to charge in that language.

"Exception.

"By the court: I charge that it must be sufficient to remove every reasonable hypothesis. Exception."

The request was not technically proper, since the rule is that the evidence must, to a moral certainty, or beyond a reasonable doubt, exclude or remove every other hypothesis than that of the defendant's guilt. (*Ruloff v. People*, 18 N. Y. 194; *People v. Fitzgerald*, 156 N. Y. 253.) But the qualification was improper, since it is difficult to conceive how any hypothesis of the defendant's innocence that remains reasonable under the evidence can be removed by it. The hypothesis of innocence must appear by the evidence to be unreasonable in order to be excluded or removed by the evidence. Doubtless the learned trial judge did not aptly express his own meaning. But his refusal to charge, followed by such a qualification, was confusing to the mind. The jury might have understood that the evidence need not be so strong as to remove to a moral certainty every other hypothesis than that of the defendant's guilt or every reasonable hypothesis of his innocence.

6. In opening the case to the jury the district attorney used this language: "We shall show you, if permitted, that before this fire, which occurred at the Boulevard, in which some seven buildings owned by the mother and family of this defendant were burned, many other buildings which this defendant had assisted in erecting, or in which he was interested, were destroyed in a similar manner. Within less than a year before the fire on the Boulevard —"

Before this statement was completed the counsel for the defendant raised the objection that it was improper. This

objection was, however, overruled by the court, to which ruling an exception was taken, whereupon the prosecuting attorney remarked: "If counsel insists upon it, I will not go into the matter at this time."

The statement made by the district attorney was thus approved by the court and may have had a prejudicial influence with the jury. If the district attorney had the right to make the proof he proposed he did not make it, and thus may have prejudiced the defendant by a charge he could not or did not intend to support; if the district attorney had no right to make the proof then the charge, although no more harmful to the defendant, was a more reprehensible invasion of his rights. In this case the defendant did not by his own hand burn or set the building on fire. The charge is that, although three miles away at the time, his father did it in the execution of a conspiracy with defendant. There could have been no innocent conspiracy to do such an act, no execution of it by honest inadvertence. *Res ipsa loquitur* as to the willfulness of such an act.

The second count of the indictment charges arson in the third degree, in that it omits to charge, as the first count does, that it was committed in the night time, and charges that it was committed with the intent to prejudice the insurer thereof; the manifest office of the second count was to prepare the way to use the evidence under it to secure conviction upon the first count. To admit evidence also that the defendant had committed the like offense before, would be to permit evidence of one to secure conviction of another.

This case is unlike the cases of larceny by trick or device, obtaining money under false pretenses, receiving stolen property knowing it to have been stolen, passing counterfeit money knowing it to be such, where the intent is determinative of the crime, but often remains in doubt when but the single transaction charged in the indictment is unfolded. An honest man may by chance be confronted by all the accusing circumstances and yet be innocent. If, however, it should appear that a person thus confronted and protesting his inno-

cence, had been involved in the like circumstances upon former occasions, confidence in his honesty would probably be replaced by a conviction of his rascality. Many cases illustrate this view, and show when such evidence is admissible. (*People v. Jefferey*, 82 Hun, 409; *People v. Dinick*, 107 N. Y. 13; *People v. Everhardt*, 104 N. Y. 591; *People v. Altman*, 147 N. Y. 478; *Copperman v. People*, 56 N. Y. 591; *Mayer v. People*, 80 N. Y. 364.) They have no application here.

It is difficult to lay down an inflexible rule applicable to irrelevant statements by the public prosecutor to the prejudice of the defendant. In some cases it is manifest they do no harm. In others, where the case depends upon a mass of circumstances, many of which are contradicted, others equivocal except as light is reflected upon them by their association, it is more important that nothing but proven and relevant facts should be brought into the whole field of observation from which the jury are to deduce their conclusion. And as the field enlarges it is the more important that care should be taken to prevent the mingling of mere statement with fact. Enough has already been said to show that the case before us is of the latter kind. If the court had sustained the objection of the defendant, the jury would have been instructed as to the range of the inquiry. As the court overruled it, they understood the district attorney to be speaking within proper limits, and they might have inferred that they were dealing with an old offender.

The judgment should be reversed and a new trial granted.

PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN and VANN, JJ., concur; HAIGHT, J., concurs in the third proposition only expressed in the opinion.

Judgment reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
CHARLES FLAHERTY, Appellant.

1. CRIME — QUALIFICATION OF TRIAL JUROR — PREFORMED OPINION — CODE CRIM. PRO. § 376. The testimony of a juror on his examination, that he has formed an opinion that the accused is guilty from the fact that he was removed from his church by the bishop, and that he would naturally be influenced by the action of the bishop, constitutes *prima facie* a disqualification, which must be removed in the method provided by section 376 of the Code of Criminal Procedure, by his declaration on oath "that he believes that such opinion or impression will not influence his verdict, and that he can render an impartial verdict according to the evidence."

2. INSUFFICIENT DECLARATION OF JUROR. A juror's declaration on oath that he could render a fair and impartial verdict upon the evidence brought out on the trial, does not remove a *prima facie* disqualification arising from his testifying that he has an opinion as to the guilt or innocence of the accused, where he does not declare on oath, as required by the statute, "that he believes that such opinion or impression will not influence his verdict."

3. PROVING DISTINCT OFFENSES UNDER INDICTMENT FOR RAPE — AUTHORIZING ELECTION AT CLOSE OF CASE FOR PROSECUTION. Permitting the prosecution to prove seven distinct acts of intercourse under an indictment charging defendant with the crime of sexual intercourse with a female, not his wife, under the age of sixteen years, on a date named, and authorizing it, after all its evidence from many witnesses has been concluded, to elect which one of the seven crimes attempted to be proved should be treated as the particular crime charged in the indictment, is such a violation of the legal rights of the defendant as calls for the reversal of a judgment of conviction.

4. INSTRUCTION TO JURY — AS TO MATTERS NOT SUSTAINED BY EVIDENCE. An instruction to the jury permitting them seriously to weigh speculations of the prosecution as to the alteration of a document by the defendant is error when the tendency of such evidence as there was on the subject was, not only to establish that he did not make the alteration, but further that he did not have the opportunity to make it.

5. EVIDENCE — WHEN DECLARATIONS OF REASONS FOR CONSENT AND FOR SILENCE IN CASE OF RAPE ARE INADMISSIBLE. Declarations as to the reasons for consent to sexual intercourse and for silence, made many months afterwards by a female under sixteen years of age, on whom the crime of rape was alleged to have been committed, are not admissible for any purpose against the defendant; and they are not made so by the fact that hearsay declarations by her as to the name of the guilty person may have been drawn out by him instead of by the prosecution.

People v. Flaherty, 27 App. Div. 535, reversed.

(Argued March 7, 1900; decided April 20, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered April 6, 1898, affirming a judgment of the Court of Sessions of Livingston county convicting the defendant of the crime of sexual intercourse with a female not his wife under the age of sixteen years.

The facts, so far as material, are stated in the opinion.

Charles Flaherty appellant, in person. The court erred in overruling the challenge of defendant to Jurors Henry Ford and George H. Snyder for actual bias. Defendant used his last peremptory challenge to exclude Ford, and was then obliged to accept Snyder. (*Greenfield v. People*, 74 N. Y. 277; *People v. Wood*, 131 N. Y. 618; *People v. Casey*, 96 N. Y. 115; *Balbo v. People*, 80 N. Y. 484; *Cox v. People*, 80 N. Y. 500; *People v. Cornetti*, 1 N. Y. Cr. Rep. 303; *People v. Tyrrell*, 3 N. Y. Cr. Rep. 142; *People v. Bodine*, 1 Den. 308.) The court erred in denying defendant's application at the opening of Marie Sweeney's evidence as to acts of intercourse, to inform defendant which of seven acts detailed in the opening of the district attorney was the act charged in the indictment. (*Read v. People*, 86 N. Y. 381; *People v. O'Sullivan*, 104 N. Y. 481.) The court erred in not striking out the evidence concerning the alteration of the baptismal record book on defendant's motion at the close of the People's case, on the ground that it was not in any way shown that it was done by the defendant, or through his instigation. (*People v. Van Zile*, 9 N. Y. Cr. Rep. 330; *People v. McKeon*, 10 N. Y. Cr. Rep. 205; *People v. Gillette*, 9 N. Y. Cr. Rep. 193; *Frazer v. People*, 54 Barb. 308; *People v. Ledwon*, 153 N. Y. 18; *People v. Owens*, 148 N. Y. 648; *People v. Plath*, 100 N. Y. 592; *Kenyon v. People*, 26 N. Y. 209; *Armstrong v. People*, 70 N. Y. 43; *Boyce v. People*, 55 N. Y. 644.) It was error to permit the witness Jennie Skillen, under exception, to state the reasons Marie Sweeney gave her, nine months after the intercourse, for having intercourse with the defendant. (*People v. O'Sullivan*,

104 N. Y. 481; *Baccio v. People*, 41 N. Y. 265; *Higgins v. People*, 58 N. Y. 377; *Young v. Johnson*, 123 N. Y. 234; *People v. Clemons*, 37 Hun, 586.)

William Carter for respondent. No error was committed by the trial court in overruling the challenges interposed to the jurors Henry Ford and George H. Snyder. (*People v. Cornetti*, 92 N. Y. 85; *People v. Carpenter*, 102 N. Y. 238; *People v. McGonegal*, 136 N. Y. 62; Code Crim. Pro. § 376; *People v. Martell*, 138 N. Y. 595; *People v. McQuade*, 110 N. Y. 284; *People v. Wilmarth*, 156 N. Y. 566.) Proof of the several acts of intercourse was not repugnant to the rule, that one crime cannot be proved in order to establish another independent crime. It was competent for the People to prove any and all the acts of sexual intercourse prior to the sixteenth birthday of the prosecutrix. If proper to compel the prosecution to elect at all, the power of the court in that behalf was properly exercised in point of time at the close of the People's case. The rulings of the trial court in this regard did not prejudice any substantial right of the defendant. (Wharton's Crim. Ev. § 35; *People v. O'Sullivan*, 104 N. Y. 481; *People v. Graner*, 12 App. Div. 464; *Regina v. Reardon*, 4 F. & F. 76; *State v. Markins*, 95 Ind. 464; *Com. v. Merriam*, 14 Pick. 518; *Com. v. Nichols*, 114 Mass. 285; *Com. v. Bean*, 137 Mass. 570; *People v. Baker*, 3 Hill, 159; *People v. Austin*, 1 Park. Cr. Rep. 154; *Nelson v. People*, 23 N. Y. 293.) The trial court did not err in permitting Jennie Skillen to testify to the reasons given by the prosecutrix to her, nine months after the intercourse, why such intercourse occurred. (*Rouse v. Whited*, 25 N. Y. 170; *People v. Beach*, 87 N. Y. 508; *Grattan v. M. L. Ins. Co.*, 92 N. Y. 274; *Platner v. Platner*, 78 N. Y. 90.)

PARKER, Ch. J. By the judgment under review Charles Flaherty was convicted of the crime of an act of sexual intercourse with a female not his wife while under the age of six-

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teen years. His contention in this court is that errors, greatly prejudicial to him, were committed in the progress of the trial, and the result of our investigation of the record has induced the conclusion that his contention is well founded. Some of the errors we shall now point out.

In the first place, the safeguards that the statute provides for the purpose of assuring a defendant in a criminal trial a fair and impartial jury were not fully observed. While the law is not so unreasonable as to require the exclusion from the jury box of all persons who have formed an opinion touching the guilt or innocence of the defendant on trial, it nevertheless treats the existence of such an opinion as establishing *prima facie* that the juror is disqualified, and the statute (Code Crim. Pro. § 376) then steps in and provides a method by which this *prima facie* disqualification may be overborne, *i. e.*, the juror must "declare on oath, that he believes that such opinion or impression will not influence his verdict, and that he can render an impartial verdict according to the evidence, and the court is satisfied, that he does not entertain such a present opinion or impression as would influence his verdict." But, as we have recently held in *People v. Wilmarth* (156 N. Y. 566), if the juror, who is *prima facie* disqualified by his opinion, fails to make such a declaration as the statute provides, his acceptance as a juror by the trial court constitutes error of law, which may be reviewed in this court where it appears that the defendant has been prejudiced thereby.

George H. Snyder, a man of considerable intelligence, was examined as to his qualifications for a juror after the defendant had exhausted his peremptory challenges, and in answer to inquiries put to him, said, among other things: "I formed my opinion as to the guilt or innocence of Father Flaherty from the fact that he was removed from his church by the bishop. He was guilty perhaps or else would not have done what they did do; that is one reason. There might be various things that I formed my opinion on; that was the most important. * * * This opinion I formed I have been satisfied was right from the time I

formed it; it is formed largely upon the action of the bishop, as I understand that. I don't know whether the action of the bishop could be investigated on this trial or not. * * * The action of the bishop proved or disproved, I would naturally be influenced by that action. * * * Possibly it may be he would not only have to prove he was not guilty, but prove in some way facts aside from that with regard to the bishop thinking that he was guilty." His examination covers several pages of the record, but that which we have quoted is sufficient to establish, to say the least, that the juror had such an opinion as to the guilt or innocence of the defendant as constituted *prima facie* a disqualification, and it became necessary, therefore, to call for the "belief" of the juror upon the two subjects referred to in the part of the section of the Code that we have quoted; namely, whether the influence or impression which the juror had would influence his verdict, and whether he could render an impartial verdict according to the evidence. But, after all this lengthy examination of the juror had ended, no such question was put to him by the prosecuting attorney; instead the court at once decided that the juror was qualified, and, from what the court said in announcing its decision of the matter, it would appear that the court was under the impression that some time during the examination an attempt had been made to bring the juror within the provisions of the statute; perhaps, indeed, that may have been what the district attorney had in mind when on the direct examination of the juror this answer from him was obtained: "Notwithstanding that opinion I could render a fair and impartial verdict upon the evidence as it shall be offered in this case." It will be observed that this answer is not at all in compliance with the statute. By it the juror did not declare on oath that he believed that such opinion or impression would not influence his verdict; hence the statute was not satisfied either as to form or substance. In overruling the challenge, therefore, the court erred to the prejudice of the defendant, who, having exhausted his peremptory challenges, was compelled to allow

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Snyder to sit as a juror, although in addition to his admitted opinion, his relations were so friendly with one Maurice Noonan, with whom the prosecutrix lived, and who personally took so great an interest and so far exerted himself in the prosecution of the defendant, as to render it especially desirable to the defendant that he should not sit.

The juror Henry Ford was excluded from the jury box by the exercise of the last of defendant's peremptory challenges. Had the defendant not been compelled to use it in excluding Ford, it would have been available to him to keep Snyder out of the jury box; but he was compelled to use it because the court refused to sustain his challenge to Ford on the ground of actual bias. Ford said in answer to defendant's counsel: "I have a pretty strong opinion now, and it would take sufficient evidence, of course, to change my mind. I am perfectly satisfied with my present opinion as correct. In hearing all the evidence introduced in this case I would have in my mind my present opinion and information and compare them, I suppose, as they came along, with what I understood about the matter. * * * I have a definite, settled and satisfactory opinion whether this girl is telling the truth or not. I hold the same opinion yet; I have not had anything to change it since." What has already been quoted sufficiently establishes that the juror had an opinion touching the guilt or innocence of the defendant. I pass over the succeeding pages of his examination to the end of it, where may be found the one question during his examination which was apparently intended to meet the requirements of the Code. That question was put by the court and was as follows: "Q. Could you, in this case, divest yourself of any opinion you entertain and render a fair and impartial verdict upon the evidence brought out on the trial here? A. I think I could. Q. Could you do it? A. Yes, sir. The Court. The juror is qualified." So the court doubtless thought; but he was not legally qualified, because the question put to him did not comply with the terms of the statute. The court did not ask the juror whether he believed that the opinion or impression that he had would not influence his ver-

dict. Such an inquiry the statute requires in terms, and for the reasons given in *People v. Wilmarth* (*supra*), which we do not deem it necessary to again present, it constitutes a most important feature of the statute's provisions and its omission leaves the *prima facie* disqualification incident to an existing opinion in full effect. It was error, therefore, for the court to overrule the defendant's challenge, and the result was that he was obliged to use his last peremptory challenge in order to exclude Ford from the jury box.

As these errors call for a reversal of the judgment, we might not consider the case further were it not that the trial was conducted in distinct violation of the rights of the defendant in most important respects, and as the same course was pursued on the former trial to a certain extent, it seems to be our duty to guard against the repetition on the next trial of some errors most damaging in effect, which the defendant has had to meet on the previous trials. The indictment charges the defendant with the crime of an act of sexual intercourse with a female not his wife under the age of sixteen years, and alleges in due form that the act constituting the crime was committed on the 1st day of July, 1892. The complainant says that the defendant had sexual intercourse with her on seven different occasions prior to her becoming of the age of sixteen years. Notwithstanding the fact that if all of said acts were committed they constituted seven distinct crimes, for only one of which defendant was or could have been charged in this indictment, the People were permitted on the former trial to prove all of these acts and the jury authorized to find the defendant guilty, provided they found he had committed any one of them. On the trial, which is the subject of this review, the court refused to follow the precedent thus set for it in one respect only; it did hold finally that the defendant could be convicted for only one offense, but that decision did not go far enough, as we shall see, nor was it made at the time that it should have been. The defendant was represented by skilled counsel, who, although having but a very short time for the preparation of the case, fully appreciated the difficulties that had unjustly

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been placed upon the defendant on the former trial to defend against seven distinct crimes where but one was or could have been charged, and so, at the very opening of the trial, by request to the court, and also to the district attorney in open court, by direct motion made and objection to evidence taken, the counsel presented in almost every way conceivable to the court that the defendant was charged with but one crime, could be tried for but one, and was entitled to know at the very beginning of the trial whether he was to be tried for a crime committed on the date alleged in the indictment, and if not, then that the People should state the date of the crime which it was purposed to prove as the one charged in the indictment. But the district attorney protested that it was his right to prove as many similar crimes as he could and to submit any one he chose as the one charged in the indictment. The court sustained the position of the district attorney and for seven days the taking of testimony on the part of the People proceeded, during the course of which twenty-one witnesses were called and testified to various outlying circumstances offered apparently in the hope that they might be in the end regarded as in some way corroborating the complainant as to some one of the transactions detailed by her. A long, skillful and, at times, effective cross-examination had taken place, but without any knowledge on the part of the cross-examiner as to which one of the seven acts about which the complainant testified was to be submitted to the jury as the crime charged in the indictment. The People rested and then the court offered to entertain a motion to compel the People to elect upon which one of the transactions it would stand. The motion was made; direction to the People given; selection made; and then just at the very moment when the defendant was obliged to put his witnesses on the stand in support of his defense he was advised, and for the first time, for what particular crime his conviction was to be asked at the hands of the jury. The statute provides that an indictment must contain "a plain and concise statement of the act constituting the crime, without unneces-

sary repetition" (Criminal Code, § 275); "must charge but one crime and in one form," except where it may be committed by different means (Criminal Code, §§ 278, 279); and this court said in *People v. Dumar* (106 N. Y. 502, 509): "The indictment, therefore, must charge the crime, and it must also state the act constituting the crime. The omission of either of these things would necessarily be fatal to the indictment." And, again, the court, in assigning a reason for the legislative requirement that the particular act constituting the crime should be stated, said: "The manifest intention of the legislature in requiring the indictment to state the act constituting the crime was, among other things, that the accused should learn from it what he was called upon to defend." In the *Dumar* case, as in others that might be cited, the indictment charged the crime of grand larceny and alleged acts constituting the crime of grand larceny, but on the trial the People attempted to prove acts constituting the crime of grand larceny it is true, but they were very different from the acts alleged in the indictment, with the result that in this court the judgment of conviction was reversed.

If this indictment had alleged the commission of the seven different acts constituting the crime of rape in the second degree it would have been bad for duplicity and, of course, a defendant cannot be convicted for a crime that cannot be alleged in an indictment, which was the situation at the time this indictment was drawn as to six of the alleged acts constituting rape in the second degree. And yet, as we have seen, the People were permitted to prove these seven distinct acts as seven distinct crimes charged in the indictment, for either one of which the defendant could be convicted under the indictment, the choice of selecting the one upon which the jury should be asked to find a verdict of guilty being left to the close of the People's case and could well have been left, according to the view of the district attorney, until it became time to present the case to the jury. In other words, the effect of erroneously alleging a crime as having been committed

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on a particular date has, if this view be correct, great advantages for the prosecution over that of alleging things truly as the law contemplates; for in the latter case even the district attorney would not contend that he could offer evidence tending to prove six other crimes and ask for the conviction for such one of them as he should elect. But the error of date in the indictment, whether the result of mistake or intention, carries with it no such power to the prosecuting officer. The indictment alleges acts constituting but one crime, and while the mistake as to the date will not prevent the prosecution from proving the crime charged in the indictment, the indictment will be deemed to cover the offense attempted to be proved nearest in point of time to the date in the indictment. It is not difficult to understand how the court came to fall into error in respect to the matter we have been considering; for to the general rule that a defendant in a criminal action cannot have proved against him the commission of other crimes unless he puts his character in issue, there is an apparent exception where the charge is of unlawful sexual intercourse. Such evidence, however, is not admitted for the purpose of proving other offenses against the law, but solely upon the view that it may tend to corroborate the complainant's account of the acts alleged in the indictment as constituting the crime. I shall only stop to hint at the reasons upon which this rule is founded, the underlying idea being that it is probable that parties who have, prior to the offense charged, indulged in sexual intercourse, did commit the specific offense charged; that the adulterous disposition of parties both before and at the time of the act of sexual intercourse in controversy is a circumstance which may be received in corroboration of other evidence upon that issue; and so it was first held that witnesses might testify to acts of the parties indicating illicit relations as corroborative of the testimony offered to prove the particular offense charged in the indictment.

And the next step taken is described in *People v. O'Sullivan* (104 N. Y. 481), and is to the effect that if such evidence be competent from disinterested witnesses who may

have observed the conduct of the parties, it is not rendered incompetent because it comes from the complainant herself. Speaking of such testimony from the complainant, Judge EARL said: "It is not as valuable, or trustworthy, or important, as if it had come from other witnesses. * * * But whether it was important or not there is no rule which condemns it, and there is abundant authority to justify its reception."

But it will be observed that while evidence of this character is admissible, it is so for the purposes of corroboration *only*. It is not admissible and never was for the purpose of showing the commission of separate offenses of the character of the one charged in the indictment in order to convict the defendant of one of the crimes thus proved. The receipt of evidence of this character necessarily presupposes the introduction of some evidence at least tending to prove the crime charged in the indictment, for until evidence tending to prove the crime charged has been introduced, there is nothing to corroborate, and, therefore, there is no justification for the introduction of evidence indicating that the parties had sustained similar relations to each other on prior occasions, upon the view that acts of illicit intercourse are not apt to be sporadic, but instead are evidence of an adulterous disposition in the parties, and are upon opportunity quite likely to be repeated. We do not mean to say that a trial court should not, under any circumstances admit corroborative evidence in advance of evidence tending to prove the offense charged, but there was no excuse for taking that course in this case. The grievance of the defendant herein is founded upon much broader lines than the mere order of procedure, and is that the court sustained the efforts of the district attorney to prevent him during seven days of the trial from finding out as to which one of the seven offenses testified to by the complainant he was indicted for and was to be tried for. This was done on the erroneous view of the law that the indictment covered not simply one offense, but each and every one of seven distinct offenses down to such time as the district attorney should be pleased

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to elect, or the court should compel him to choose, one offense for presentation to the jury, at which moment the other six offenses would cease to be covered by the indictment. This is a view for which we have been unable to find any support either in principle or authority.

Again the court erred in charging the jury touching the alteration of the baptismal record. Upon that subject it said, among other things, "On the other hand, the people claim that there was opportunity to change it, and that the defendant was the only person who could be interested in the change of the record, and they ask you to infer from that that he is the man who did it. * * * If, however, you do come to the conclusion that he did it, then you are to give it such weight as corroborating testimony as you deem it entitled to." Such evidence as there was on the subject was given by Mr. Peck, Father Hendricks and Bridget King, and its tendency was not only to establish that the defendant did not do the deed, but, further, that he did not have the opportunity. And yet, without evidence to the contrary, and in the face of evidence strongly indicating that the defendant did not alter the record, the jury were permitted seriously to weigh the speculations of the prosecution based upon the defendant's being in the presence of the record with Father Hendricks and Mr. Peck, as against the testimony of the last-named persons, which included a statement by Mr. Peck that he took a copy of the record then and there, and the record had not then been changed.

The People were also allowed to show by the testimony of Jennie Skillen the reasons given by the complainant nearly nine months after the first act of sexual intercourse that induced her to consent and persuaded her to silence. Those reasons must have been most prejudicial to the defendant with the jury, and yet no authority can be found for their admission. The charge of rape made against a man, if promptly made, may be received in evidence, although hearsay, in corroboration of the complainant's story. (*People v. O'Sullivan, supra*, and cases cited.) But declarations made months afterwards for the

purpose of excusing her consent to the act are not admissible for any purpose. And it is not seriously contended otherwise, the claim now made being that defendant's counsel in cross-examining the witness Skillen opened the door wide enough to let in this hearsay and improper testimony. A district attorney should not be looking for openings through which he may pass, without danger to his case on appeal, testimony not favored by any rule of evidence in the hope that he may affect defendant's case to his prejudice by considerations that are justly abhorred by the law and its faithful administrators. It is his duty to seek a conviction through lawful methods and that includes legal evidence and the court should not encourage new devices that aim at different results. Now the district attorney having brought out the fact that the accusation against defendant by Marie Sweeney was first made to the Skillen family, the defendant sought to show on cross-examination that Jennie Skillen had first suggested the name of Father Flaherty to Marie Sweeney as the author of her misfortune. Counsel said: "Didn't you say to her, 'Wasn't it Father Flaherty?'" and she said 'yes?' A. No, sir, I did not. Q. How did you say that? A. As near as I can remember I asked her who she had been with. She didn't answer. I said, 'Marie, you know and I know you have been with some one, and I want you to tell me who the author of your trouble is.' She wouldn't tell me. Q. I only ask you for the question and the answer, the time when the name of Father Flaherty was used; what did you say and what did she say? A. I said, 'Who was it?' * * * She then said it was Father Flaherty. Q. And that was the first mention she made of the name of Father Flaherty in the matter? A. Yes, sir." This was all of the cross-examination on that subject. The counsel for the People then put the question which, after referring to the statement of Marie Sweeney that Father Flaherty was responsible for her condition, concluded as follows: "Did she give you any reason why she had intercourse with him?" These reasons were not competent as evidence prior to the cross-examination of the witness, nor were they made either necessary or competent by

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that cross-examination. This was not a case where a part of a conversation being given, the rest was needed in order to present the situation fairly; nor did the question call for the rest of the conversation, but instead it asked for the reasons only, and they were not competent as evidence for any purpose; nor is there even excuse for suggesting that they were made so by the fact that the hearsay declarations of the complainant as to the name of the person responsible for her condition was perhaps drawn out by the defendant instead of the People.

The judgment of conviction should be reversed and new trial ordered.

O'BRIEN, BARTLETT, VANN and LANDON, JJ., concur; HAIGHT, J., concurs except as to the competency of jurors, and MARTIN, J., in result.

Judgment of conviction reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
ANTONIO FERRARO, Appellant.

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78 AD 569

APPEAL—ALLOWANCE TO COUNSEL IN CAPITAL CASE—CODE OF CR. PRO. § 308. An allowance of compensation to counsel for services rendered on appeal to the Court of Appeals, in pursuance of an assignment in a capital case, is proper, although the sum of \$500 has been allowed by the trial court for services rendered at the trial, as section 308 of the Code of Criminal Procedure, limiting such compensation to that amount, applies to the trial and appellate courts separately and not collectively.

(Argued April 23, 1900; decided May 1, 1900.)

MOTION by the corporation counsel, in behalf of the comptroller of the city of New York, to amend an order made by the Court of Appeals on February 26, 1900.

The facts, so far as material, are stated in the opinion.

John Whalen, Corporation Counsel (George Landon of counsel), for motion.

Hugo Hirsh opposed.

Per Curiam. The defendant appealed to this court from a judgment of death pronounced against him by the County Court of Kings county, and, after deciding the appeal, we made an order allowing his counsel compensation for his services in prosecuting said appeal, in addition to the sum incurred by him for disbursements. The comptroller now moves to amend the order by striking therefrom the amount allowed for compensation, upon the ground that the allowance of the sum of \$500 to counsel by the trial court for services in defending the accused at the trial exhausted the amount that can be allowed, under the statute, for services upon both the trial and the appeal. (Code Cr. Pro. § 308.)

We have repeatedly held that said section, when construed in the light of the several progressive changes made by the legislature, means that the limitation imposed by the words "not exceeding the sum of five hundred dollars" applies to the trial court and to the appellate court separately, and not collectively. (L. 1881, ch. 442, § 308; L. 1893, ch. 521, § 1; L. 1895, ch. 725, § 1; L. 1897, ch. 427, § 1; *People v. Barone*, 161 N. Y. 475, 477.)

The motion should be denied, with ten dollars costs.

PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN and VANN, JJ., concur.

Motion denied.

NATHANIEL NILES, Appellant, v. MARTIN MATHUSA and the HINCKEL BREWING COMPANY, Respondents.

1. LIQUOR TAX CERTIFICATE NOT A CHATTEL — ASSIGNMENT THEREOF NEED NOT BE FILED AS A CHATTEL MORTGAGE. A liquor tax certificate issued under the Liquor Tax Law (L. 1896, ch. 112) is personal property, but it is not a chattel within the purview of the Chattel Mortgage Act (1 R. S. [9th ed.] 2013), and a transfer thereof as security for a loan is valid as against a subsequent judgment creditor of the assignor, although not filed as a chattel mortgage.

2. ESTOPPEL. An assignee of a liquor tax certificate, who allows it to remain in the hands of the assignor, is not thereby estopped from setting up title thereto as against a subsequent judgment creditor of the assignor; and, although such creditor is entitled to reach, through a receiver in sup-

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plementary proceedings, the assignor's interest in such certificate, subject to the provisions of the Liquor Tax Law, he stands in no different or better position than if he were a subsequent assignee of the certificate as security for his debt.

Niles v. Mathusa, 20 App. Div. 483, affirmed.

(Argued March 28, 1900; decided May 1, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered in favor of defendants September 18, 1897, upon the submission of a controversy on an agreed statement of facts under section 1279 of the Code of Civil Procedure.

The facts, so far as material, are stated in the opinion.

George H. Corey and *George E. Morgan* for appellant. The liquor tax certificate is property, the assignment of which must be recorded to be good as against a *bona fide* creditor. (*People v. Durante*, 19 App. Div. 292; *Neligh v. Michenor*, 3 Stock. Ch. 542; Story's Eq. Juris. § 1021.) The assignee, by allowing the certificate to remain in the hands of the assignor, and by clothing him with the apparent ownership, is estopped from now setting up title to such certificate. (*McNeil v. T. Nat. Bank*, 46 N. Y. 325; *Moore v. M. Nat. Bank*, 55 N. Y. 41; *Matter of Gillespie*, 15 Fed. Rep. 734; Bispham's Principles of Equity [5th ed.], §§ 168, 169; 1 Am. & Eng. Ency. of Law, 840; *Judson v. Corcoran*, 17 How. [U. S.] 612; *Spain v. Hamilton*, 1 Wall. 625; *Van Buskirk v. H. Ins. Co.*, 14 Conn. 145; *Campbell v. Day*, 16 Vt. 558; 2 Pomeroy on Equity, § 698.)

Robert G. Scherer and *J. Murray Downs* for respondents. The liquor tax certificate was assignable. (*People ex rel. v. Lyman*, 156 N. Y. 410.) The certificate is a chose in action. (*Niles v. Mathusa*, 20 App. Div. 483; *Koehler & Son Co. v. Flebbe*, 21 App. Div. 210; *Anchor Brewing Co. v. Burns*, 32 App. Div. 272; *Matter of Jenney*, 19 Misc. Rep. 244.) It was not necessary to file the assignment of the certificate in the county clerk's office. (*Niles v. Mathusa*, 20 App. Div. 483; *Koehler &*

Son Co. v. Flebbe, 21 App. Div. 210; *Matter of Jenney*, 19 Misc. Rep. 244; *Thomas v. Schumacher*, 17 App. Div. 441; Code Civ. Pro. § 3343; L. 1896, ch. 908, § 2, subd. 4; L. 1897, ch. 417, § 21, subd. 6; 3 Am. & Eng. Ency. of Law, 167, 235.) The assignment to the defendant Hinckel Brewing Company being prior in point of time, is effectual as against the plaintiff, a creditor by execution, and it was not necessary for the defendant brewing company to give any notice to subsequent assignees or attaching creditors. (*Chambers v. Lancaster*, 160 N. Y. 348; L. 1897, ch. 418, § 115; *Williams v. Ingersoll*, 89 N. Y. 509; *Fortunato v. Patten*, 147 N. Y. 277; *Matter of Hone*, 153 N. Y. 522; *York v. Conde*, 147 N. Y. 486.)

BARTLETT, J. The Hinckel Brewing Company in June, 1896, loaned to defendant Mathusa money for the purpose of purchasing a certificate under the Liquor Tax Law (Ch. 112, Laws 1896); Mathusa assigned the certificate to the company as security for the loan, the same to remain its property until payment.

In December, 1896, the plaintiff recovered a judgment against Mathusa, and issued execution thereon which was returned unsatisfied.

Proceedings supplementary to the execution were instituted and a receiver duly appointed.

The plaintiff claims that the liquor tax certificate is a chattel, and a transfer thereof as security for a debt is only valid as against creditors when it is filed as a chattel mortgage.

It is also argued that as the assignee allowed the certificate to remain in the hands of the assignor, thus clothing him with apparent ownership, he is estopped from setting up title as against plaintiff.

The question whether the certificate is to be regarded in law as a chattel is now presented to this court for the first time. The Appellate Divisions are not at agreement on this subject. In *People v. Durante* (19 App. Div. 292) the Appellate Division, first department, held the certificate to be

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personal property within the definition of the statute that "everything except real property, which may be the subject of ownership," is personal property. (Statutory Construction Act, Laws 1892, ch. 677, § 4.)

From this it was argued that everything which may be assigned is capable of being mortgaged, and, consequently, a chattel mortgage of a certificate is valid.

In *Koehler & Son Co. v. Flebbe* (21 App. Div. 210) and *Anchor Brewing Co. v. Burns* (32 App. Div. 272) the Appellate Division, second department, held that the certificate is a chose in action and not a chattel.

The certificate is very brief, its form being set forth in the statute. It is issued by the special deputy commissioner or the county treasurer, and is merely a receipt for the money paid, by the person named, as excise tax under the law on the business of trafficking in liquor to be carried on in a certain place for a definite period.

Beneath the date and signature appear these printed words: "Severe penalties are imposed for neglect or refusal to place and keep this certificate conspicuously in your place of business."

The rights and privileges conferred and obligations imposed by this certificate are to be found in the statute and not on the face of the instrument.

The certificate differs essentially from the licenses issued under former excise laws; it may be surrendered and the unearned portion of the tax is returned; it can be assigned, subject to the limitations of the statute, and if the holder dies it is an asset in the hands of his executor or administrator who may collect the rebate. The certificate is undoubtedly personal property under accepted definitions, but it remains to be considered whether it is in legal contemplation a chattel, and, consequently, within the following provision of the Revised Statutes relating to chattel mortgages: "Every mortgage or conveyance intended to operate as a mortgage, of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery and be followed by an actual

and continued change of possession * * * shall be absolutely void * * * unless the mortgage, or a true copy thereof, shall be filed. * * *” (Laws 1833, ch. 279, § 1; *Æ. S.* [9th ed.] p. 2013.)

The Statutory Construction Law (Ch. 677, Laws 1892, § 4) provides: “The term personal property includes chattels, money, things in action, and all written instruments themselves, as distinguished from the rights or interests to which they relate, by which any right, interest, lien or incumbrance in, to or upon property, or any debt or financial obligation is created, acknowledged, evidenced, transferred, discharged or defeated, wholly or in part, and everything, except real property, which may be the subject of ownership. The term chattels includes goods and chattels.”

The Tax Law (Ch. 908, Laws 1896, § 2, subd. 4) provides: “The terms ‘personal estate,’ and ‘personal property,’ as used in this chapter, include chattels, money, things in action, debts due from solvent debtors, whether on account, contract, note, bond or mortgage,” etc.

This section deals with other details not necessary to quote and includes public stocks, stocks in moneyed corporations, etc.

Bouvier’s Law Dictionary, title “chattel,” states: “Personal chattels are, properly, things movable, which may be carried about by the owner, such as animals, household stuff, money, jewels, corn, garments and everything else that can be put in motion and transferred from one place to another.”

The definitions quoted above are exceedingly elementary, but the contention of the appellant renders it necessary to recall them as they are a complete answer to his argument.

The term “personal property” is comprehensive and includes chattels; the term “chattel” refers to things that can be used, handled, transported, as horses, carriages, furniture, machinery, tools and the numberless objects to be seen about us in every-day life, the value of which is in the possession of the thing itself.

The drafter of the Chattel Mortgage Act, when confining

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its operation to "goods and chattels," had the clear distinction in mind which has always existed between personal property and chattels.

The certificate, the nature of which we are considering, has no attribute of a chattel; the holder of it has in his possession a paper writing which is a receipt for money and a license to traffic in liquors, which may be canceled at his pleasure, assigned, and will pass to his legal representatives if he dies.

In so far as the paper is a receipt, the fact appears on its face; to ascertain the other rights of the holder resort must be had to the statute.

If a thief should steal this certificate it would be waste paper in his hands; if he should make off with a horse and escape detection he would realize its value.

In the one case the thief would be in possession of an unassigned chose in action and in the other of a chattel which could be sold for its full value.

The liquor tax certificate is personal property, but it is not a chattel within the purview of the Chattel Mortgage Act.

The appellant's further point is that as the assignee allowed the certificate to remain in the hands of the assignor, thus clothing him with apparent ownership, he is estopped from setting up title as against plaintiff.

The appellant is not a *bona fide* purchaser, but a judgment creditor.

There is no proof as to when the cause of action arose that is represented by the judgment, nor is there evidence that the plaintiff parted with anything of value, or changed his situation in any way to his damage, on the faith of Mathusa's apparent ownership of the certificate.

The brewing company received its assignment of the certificate about six months before the plaintiff recovered his judgment. The plaintiff, as a judgment creditor, is entitled to reach, through the receiver in supplementary proceedings, Mathusa's interest in the certificate, subject to the provisions of the Liquor Tax Law and nothing more. He stands in no

different or better position than if he were a subsequent assignee of the certificate as security for his debt.

The law is well settled in this state that as between different assignees of a chose in action by express assignment from the same person, the one prior in point of time will be protected, although he has given no notice of such assignment to either the subsequent assignee or the debtor. (*Fortunato v. Patten*, 147 N. Y. 277, 283; *Fairbanks v. Sargent*, 104 N. Y. 108; *S. C.*, 117 N. Y. 320; *Williams v. Ingersoll*, 89 N. Y. 508; *Muir v. Schenck*, 3 Hill, 228.)

The judgment appealed from should be affirmed, with costs.

GRAY, MARTIN, CULLEN and WERNER, JJ., concur; PARKER, Ch. J., not voting; VANN, J., absent.

Judgment affirmed.

ROXA SQUIER, Respondent, v. HANOVER FIRE INSURANCE
COMPANY OF NEW YORK, Appellant.

1. FIRE INSURANCE—ORAL CONTRACT OF LOCAL AGENTS TO CONTINUE RISK AND RENEW IT ON CREDIT. Where a member of a firm of local fire insurance agents, authorized to countersign, issue and renew policies, agrees orally to continue an existing contract of insurance and issue a renewal or policy therefor, the insurer is bound although credit was given for the renewal premium.

2. WITNESS—CREDIBILITY. Where the insurer and its agents assume the position that the policy in suit had lapsed before the loss occurred, the insured may, for the purpose of attacking the credibility of the agents sworn upon the trial, ask them on cross-examination whether they have not stated, in substance, to third parties that they thought the loss would be adjusted and paid and that the insured would not lose the amount, and, in case of their denial, the insured may show that they had made such statements.

Squier v. Hanover Fire Ins. Co., 18 App. Div. 575, affirmed.

(Argued March 16, 1900; decided May 1, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 28, 1897, affirming a judgment in favor of plaintiff

entered upon a verdict, and an order denying a motion for a new trial.

This action was brought to recover upon a policy of fire insurance alleged to have been renewed by a verbal contract between the plaintiff's husband, acting as her agent, and one of the firm of Horton Brothers, the agent of the defendant, made about ten days before the expiration of said policy, the premium to be paid and the policy called for within thirty days of the making of the alleged contract.

The facts, so far as material, are stated in the opinion.

Horace McGuire for appellant. Horton Brothers were not authorized to make verbal contracts of insurance, and the alleged contract, if made, was outside the scope of their authority. (*Shank v. G. F. Ins. Co.*, 4 App. Div. 516; *Moore v. H. F. Ins. Co.*, 141 N. Y. 224; *Quinlan v. P. W. Ins. Co.*, 133 N. Y. 356; *O'Reilly v. Corp. London Assur.*, 101 N. Y. 575.) The court erred in allowing evidence of the admissions and declarations of the agent after the fire and after the alleged executory contract was made. (Gillet on Ev. 135, § 90; Greenl. on Ev. [16th ed.] 589; *V. & M. R. R. v. O'Brien*, 119 U. S. 99; *Idaho Forwarding Co. v. F. F. Ins. Co.*, 17 L. R. A. 586; *Sherman v. D., L. & W. R. R. Co.*, 106 N. Y. 547; *McNeill v. M. S. Ry. Co.*, 20 Misc. Rep. 426.) The agreement testified to by the plaintiff's husband was the agreement of Charles Horton, or of Horton Brothers, and not the agreement of the defendant. (*Sargent v. N. F. Ins. Co.*, 86 N. Y. 626.)

A. C. Wade for respondent. The agreement of the agent to renew the policy by issuing a new one on the expiration of the old was a valid agreement and binding upon the defendant. (*F. B. Church v. B. F. Ins. Co.*, 19 N. Y. 305; *Ellis v. A. C. F. Ins. Co.*, 50 N. Y. 402; *Van Loan v. F. M. F. Ins. Co.*, 90 N. Y. 280; *Post v. A. Ins. Co.*, 43 Barb. 351; *Kelly v. C. Ins. Co.*, 10 Bosw. 82; *Van Schoick v. N. F. Ins. Co.*, 68 N. Y. 434; *Church v. L. F. F. Ins. Co.*, 66 N.

Y. 223; *Angell v. H. F. Ins. Co.*, 59 N. Y. 171; *Reynolds v. W. F. Ins. Co.*, 8 App. Div. 193; *Audubon v. E. Ins. Co.*, 27 N. Y. 216.) The term of credit given by the agent to the insured in no sense impairs the validity of the contract. (*F. B. Church v. B. F. Ins. Co.*, 19 N. Y. 305; *F. B. Church v. B. F. Ins. Co.*, 18 Barb. 69; *Goit v. N. P. Ins. Co.*, 25 Barb. 189; *C. M. Ins. Co. v. U. M. Ins. Co.*, 19 How. [U. S.] 318.)

BARTLETT, J. As the judgment for plaintiff was unanimously affirmed by the Appellate Division, the facts are conclusively settled in her favor.

The Hanover Fire Insurance Company in 1893 was represented at Jamestown, N. Y., by its agents, Horton Brothers, who issued a policy to the plaintiff, dated December 20th, 1893, insuring certain personal property for the term of one year. The property was destroyed by fire on the 29th day of December, 1894.

The plaintiff's contention is that the policy was duly renewed prior to its expiration, December 20th, 1894; the defendant insists the policy expired on the last-named date.

The jury have necessarily found that a verbal contract, renewing the policy for another year, was made between the plaintiff's husband, acting as her agent, and one of the firm of Horton Brothers about ten days before expiration; that plaintiff was to pay premium in not more than thirty days and call and get policy.

The learned counsel for the defendant raises his first question of law, based on this finding of fact, to the effect that the agents of the company had no authority to make a verbal contract to continue a risk beyond the expiration date.

The defendant read in evidence the certificate of appointment making Horton Brothers its agents at Jamestown, and among other powers therein conferred was "to countersign, issue and renew policies of insurance."

The oral contract is the ordinary and usual agreement which an insurance agent makes on the eve of a policy expiring that

he will renew it. The question in this case is not whether the agent can enter into a parol contract of insurance that will bind the principal, but rather, having agreed orally to continue an existing contract of insurance and issue a renewal or policy therefor, the defendant is bound thereby.

This court considered the question in *Ellis v. Albany City Fire Insurance Co.* (50 N. Y. 402) and held the parol contract valid. In a later case (*Angell v. Hartford Fire Ins. Co.*, 59 N. Y. 171) the authority cited was followed, and it was further held that the payment of premium, at the time of the oral agreement, is not necessary to make the contract binding on the company; if a credit be given by the agent it is equally obligatory. (*Trustees, etc., v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305; *Audubon v. Excelsior Ins. Co.*, 27 N. Y. 216.)

In *Ruggles v. American Central Ins. Co.* (114 N. Y. 415), this court, in the Second Division, upheld the oral agreement from the date of the conversation. (See, also, the recent case of *Hicks v. British American Ins. Co.*, 162 N. Y. 284.)

The matter of parol agreement by a local insurance agent was quite recently before this court in a case involving the oral promise of the agent made with the transferee of the property and policy to go where the latter was kept by a third person and make the required indorsement. The agent failed to keep his promise, a fire occurred, and it was held that the transferee could recover from the company the amount of the insurance as damages for the breach of such oral agreement. (*Manchester v. Guardian Assurance Co.*, 151 N. Y. 88.) The line of cases cited was there approved.

In the case at bar it follows that the oral agreement of defendant's agents to renew plaintiff's insurance was a contract they were legally competent to make, and the recovery thereon must be sustained.

The defendant further insists, however, that there was legal error in allowing, over its objection and exception, certain questions to be propounded to the agents, Horton Brothers, on cross-examination, whereby it was sought to lay the foundation for their collateral impeachment.

Charles L. Horton was asked if he knew Charles H. Wickes, a real estate man residing in Jamestown, and whether he had a talk with him about the fire a week or ten days after it occurred. The witness stated that he knew Wickes, but recalled no conversation. This question was then put to him: "Q. Did he ask you, referring to this fire, if they were settling with Squier's people for their loss, or that in substance, and did you reply that you had written the adjuster and you thought when he got here the loss would be settled and paid, or that in substance? A. I did not."

Plaintiff placed Wickes on the stand, who stated that he knew Horton and had a talk with him about the fire. This question was put to him: "Q. And did you ask him if they, the insurance company, were settling with Squier's people for their loss, or that in substance, and did he reply that he had written the adjuster and he thought that when he got there the loss would be settled and paid, or that in substance? A. He did."

Walter B. Horton, the other member of the firm of Horton Brothers, when under cross-examination, was asked this question: "Q. In that conversation did you say or did Mr. Rich say to you in the presence of Mr. Wells, 'It is a hard blow for Mr. Squier or Mrs. Squier,' and ask you if he had got to lose this amount, and did you reply, in substance, that you thought not, that you thought you could get it for him? A. What you said I didn't say at all. The substance is different. I didn't say that in substance."

Wells was placed upon the stand, and, on being duly questioned, testified that Walter B. Horton stated to him substantially that which is embodied in the above question.

The defendant's counsel objected to the question asked Charles L. Horton, on the ground that it was incompetent, immaterial and "any declaration made by this witness that an adjuster would come or pay a loss if the company was not liable for a loss would not bind the company."

The same objection, in substance, was interposed to the question asked Walter B. Horton.

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It is very clear, from the form of these objections, that the counsel for the defendant misapprehended the object of asking these questions. The oral contract had been proved by plaintiff's counsel when the case was with him and he now sought, not to adduce additional evidence as to the making of the contract, but to lay the foundation for proving that the agents had in conversations subsequent to the fire made statements as to facts involved within the issues wholly inconsistent with the position assumed by them in defending this action and as witnesses at the trial.

The rule is well settled that a witness may be asked on his cross-examination, with a view to his credibility, whether he has not made statements touching a material issue in the cause at variance with his testimony in chief, and if he denies having made such statements, the party against whom he is called may show, by other witnesses, that he did make them. (*Patchin v. Astor Mutual Ins. Co.*, 13 N. Y. 268; *Schell v. Plumb*, 55 N. Y. 592; *People v. Schuyler*, 106 N. Y. 298; 1 Greenleaf's Ev. [16th ed.] §§ 461f, 462 *et seq.*)

Applying this rule to the facts in the case at bar, it is clear that the questions asked Horton Brothers under cross-examination bore strongly upon their credibility by showing declarations made by them after the fire at variance with their evidence at the trial and their general position as agents of the defendant.

We have this situation: The plaintiff insisting the policy of insurance was seasonably renewed, and the defendant asserting, through its agents, that the risk on the property terminated by lapse of time nine days before the fire.

In other words, at the time the property was destroyed, the defendant company rested under no legal obligation to pay the loss, and the plaintiff might have, with equal propriety, sued any other insurance company in the state of New York.

This being so, there was but one position that Horton Brothers, the agents of the company, could consistently assume and maintain, to wit, the positive denial of liability. It was, however, established by disinterested witnesses at the

trial, after the foundation had been duly laid for the evidence and the attention of Horton Brothers sharply called to the precise point involved, that Charles L. Horton said shortly after the fire that he had written the adjuster and thought when he got there the loss would be adjusted and paid.

Walter B. Horton, under like circumstances, stated that he did not think plaintiff would lose the amount, and that he thought he could get it for her.

These statements were inconsistent with the position of no liability on the part of the defendant, and if the jury believed the disinterested witnesses who swore to them, they were justified, in the exercise of their honest judgment, in rejecting the entire evidence of Horton Brothers.

The judgment appealed from should be affirmed, with costs.

PARKER, Ch. J., MARTIN, VANN, CULLEN and WERNER, JJ., concur; GRAY, J., not voting.

Judgment affirmed.

182	558
f169	1252
162	558
e170	1147

CHARLES L. WALTON, as Assignee for the Benefit of Creditors of FRANCIS T. WALTON, Respondent, v. ROBERT STAFFORD, et al., Appellants.

1. LANDLORD AND TENANT — RENT FALLING DUE ON LEGAL HOLIDAY. Rent becoming due on a legal holiday, other than Sunday, is payable on that day.

2. ASSIGNEE FOR BENEFIT OF CREDITORS — RENT — USE AND OCCUPATION — COUNTERCLAIM. A general assignee of a tenant is not liable to the landlord for a monthly payment of rent which fell due on a secular legal holiday occurring on the day before the making of the assignment and the commencement of his occupation, nor for use and occupation where the lease has remained in effect during the entire period of his occupancy; and, therefore, neither the rent nor the value of the use and occupation can be offset by the landlord against a claim by the assignee for the price of chattels of the assignor sold by the assignee, during his occupation, to the landlord.

Walton v. Stafford, 14 App. Div. 810, affirmed.

(Argued March 23, 1900; decided May 1, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 29, 1897, in favor of plaintiff, the trial court having directed a

verdict in favor of defendants upon their counterclaim, subject to the opinion of the Appellate Division.

The nature of the action and the facts, so far as material, are stated in the opinion.

James M. Gifford for appellants. The assignee is liable upon the covenant to pay rent which matured while he was in possession. (*Woodruff v. E. Ry. Co.*, 93 N. Y. 624; *Frank v. N. Y., L. E. & W. R. R. Co.*, 122 N. Y. 219; *Holsman v. De Gray*, 6 Abb. Pr. 79; *Young v. Peyser*, 3 Bosw. 308; *Astor v. Lent*, 6 Bosw. 612; *Jones v. Hausmann*, 10 Bosw. 168; *Sayles v. Kerr*, 4 App. Div. 150; *State Bank v. Wise*, 3 Watts [Penn.], 394; *Greider's Appeal*, 5 Penn. St. 426; *Prentiss v. Kingsley*, 10 Penn. St. 123.) If the assignee cannot be held on the covenant he is, at all events, liable for a reasonable satisfaction for the use and occupation of the premises. (1 R. S. 728, § 26 [L. 1896, ch. 547, § 190].; *People v. Simpson*, 28 N. Y. 55; *Jarvis v. Driggs*, 69 N. Y. 143; *Brown v. Mayor, etc.*, 66 N. Y. 385; *Lamb v. Lamb*, 146 N. Y. 317; *Preston v. Hawley*, 139 N. Y. 296; *Collyer v. Collyer*, 113 N. Y. 442.)

Everett Masten for respondent. If the plaintiff incurred any liability whatever for the rent, it could only have been as a mere assignee of the lease and upon the same principles and to the same extent as any other assignee of a lease, that is to say, not through any privity of contract, but only through privity of estate, and for such installments of rent as by the terms of the lease became due and payable after such privity of estate arose. (*Childs v. Clark*, 3 Barb. Ch. 52; *McAdam on Land. & Ten.* [2d ed.] 283; *Anderson v. Hamilton*, 16 Daly, 18.) The rent was due and payable on the first day of the month. (*Daniels Leases* [London ed., 1895], 49; *Craig v. Butler*, 156 N. Y. 672; 83 Hun, 286.) An assignee of a lease under the circumstances of this case is not liable for use and occupation. (*Frank v. N. Y., L. E. & W. R. R. Co.*, 122 N. Y. 197; *Kiersted v. O. & A. R. R. Co.*, 69 N. Y. 343.)

BARTLETT, J. The claim set forth in the complaint is not disputed, and the question presented by this appeal is whether the defendants are entitled to judgment on their counterclaim for balance unpaid after deducting amount due plaintiff.

The plaintiff's assignor, Francis T. Walton, leased of the defendants in February, 1893, the Grand Hotel, in the city of New York, for a term of years; the tenant, on the 2d day of January, 1894, made a general assignment for the benefit of his creditors to the plaintiff, and the latter took possession of the assigned property on that day.

This case was heard at the Trial Term upon a stipulation as to the facts. The plaintiff continued in possession of the demised premises until January 28, 1894, at which time a warrant in dispossession proceedings was issued, and he thereupon surrendered possession to the defendants.

During the month of January, while so occupying the hotel premises, the plaintiff collected rent from the sub-tenants, hired the employees and carried on the general business, but paid no rent.

On the 27th of January, 1894, plaintiff sold to the defendants certain personal property, located on the premises, at the agreed price of \$811.16. The plaintiff brought this action to recover that amount, and the defendants, admitting the same to be due, set up a counterclaim to the effect that plaintiff is liable to them for rent for the month of January, 1894, and that after crediting amount due plaintiff there is due them \$3,348.84, with interest from January 1, 1894.

The annual rental under the lease was \$51,000, payable in twelve equal monthly payments to be made in advance on the first day of each and every month.

It is stipulated in writing as follows: "Plaintiff's assignor, Francis T. Walton, failed to pay the rent for the month of January, amounting to four thousand two hundred and fifty (\$4,250), which, pursuant to the provisions of the lease, he was obligated to pay on the first day of the month."

The defendants' counterclaim is based upon the contention that, as the first day of January, 1894, was a legal holiday, the

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rent did not become due until the next day, and as the plaintiff was then in possession as assignee for the benefit of the tenant's creditors he was liable to pay the rent, as it accrued during the period of his occupancy.

It is conceded that there was only privity of estate existing between the assignee and the landlords from and after January 2, 1894. It is also admitted that on the 2d day of January, 1894, after the deed of assignment had been filed, and the assignee taken possession, defendants' agent called on plaintiff and demanded payment of the rent for the month of January, which was refused. It is the well-settled law that an assignee for the benefit of creditors when receiving, among the assets of his assignor, the unexpired term of a lease, has a reasonable time in which to decide whether he will accept the lease and assume the burdens of its covenants on behalf of the estate, or surrender possession of the premises to the landlord.

The question is of no importance in this case, as the acts of the assignee amounted to an acceptance of the assignment of the lease, and also for the further reason that the relation of landlord and tenant was terminated on the 28th day of January, 1894, by the removal of plaintiff from the premises under the warrant issued in summary proceedings before any rent was due from him, as he contends.

As the parties, under the portion of the stipulation already quoted, have admitted that the January rent was due on the first day of the month, we would be warranted in holding that the defendants' counterclaim has no foundation in law; but we prefer to rest our decision on the additional ground that the rent falling due on January 1st, 1894, was payable at that time, notwithstanding it was a legal holiday.

It is conceded that the day of the week was not Sunday, but Tuesday.

We are aware of no controlling authority or positive statute that prevents rent, falling due on a legal holiday, which is not Sunday, from being treated as due and payable on that day.

The Statutory Construction Law (Laws 1892, ch. 677, § 27) provides as follows: "A number of days specified as a period from a certain day within which or after or before which an act is authorized or required to be done means such number of calendar days exclusive of the calendar day from which the reckoning is made. Sunday or a public holiday * * * must be excluded from the reckoning if it is the last day or an intervening day of any such period of two days."

This law was amended (Laws 1897, ch. 614, § 1) by increasing the number of legal holidays enumerated in section 24 of the act of 1892, and then providing: "The days and half days aforesaid shall be considered as the first day of the week, commonly called Sunday, and as public holidays or half holidays, for all purposes whatsoever as regards the transaction of business in the public offices of the state, or counties of this state."

There is also a statutory enactment that where a negotiable instrument matures on Sunday or a holiday it is payable on the next succeeding business day (Laws 1887, ch. 289; The Negotiable Instruments Law, § 145; Laws 1897, ch. 612, § 5). As banks close on legal holidays this legislation was necessary in regard to commercial paper.

We thus have holidays distinctly dealt with by the legislature as to computation of time in certain cases, as to the transaction of business in public offices and as to the falling due of commercial paper, but the matter of rent and its payment is unaffected by this legislation.

In this case the rent was due and payable on January 1st, 1894, and consequently during the period the assignee occupied the premises no rent fell due.

The rent was a due debt the assignor owed the defendants at the time he executed his general assignment on the 2d day of January, 1894.

The appellants contend that if the assignee cannot be held for the rent he is at least liable for the use and occupation of the premises, as he collected rent from the sub-tenants and otherwise enjoyed the use of the premises without paying anything for the privilege.

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Statement of case.

The answer to this contention is that the landlord might have at once removed both the assignor and assignee from the premises by reason of the former's failure to pay the January rent when due.

The assignee merely entered the premises as succeeding to the rights of his assignor. If the assignee had remained in possession of the premises no rent would have been due from him until February 1st, 1894. Privity of estate between him and the landlords began on January 2d, 1894, and no rent fell due before he was removed from the premises, and as a result he owes nothing to the lessors. (*Childs v. Clark*, 3 Barb. Ch. 52, 60.)

There can be no recovery of the plaintiff for use and occupation, as the lease was in full force and effect during the period of his occupancy.

The judgment of the Appellate Division should be affirmed, with costs.

PARKER, Ch. J., GRAY, CULLEN and WERNER, JJ., concur; MARTIN, J., concurs in result; VANN, J., not voting.

Judgment affirmed.

JOSEPH LEFROIS, Respondent, v. THE COUNTY OF MONROE,
Appellant.

1. COUNTIES — LIABILITY FOR ACTS OF OFFICIALS IN MAINTAINING A NUISANCE. A county, which owns and maintains, for public purposes, a penitentiary, almshouse and farm used therewith, acts in a governmental capacity and is not liable for the acts of the officials controlling them, in permitting sewage and night soil from the buildings to be spread over the farm, thereby creating and continuing a nuisance to the damage of the land and stock of a neighboring owner, and he cannot maintain an action against the county for an injunction restraining such nuisance and for damages caused thereby.

2. REMEDY. *It seems*, that the remedy of the neighboring owner is to proceed against the board of supervisors and the officers in control of the penitentiary and almshouse to have a continuance of the nuisance enjoined.

Lefrois v. County of Monroe, 24 App. Div. 421, reversed.

(Argued January 25, 1900; decided May 1, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 1, 1898, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

John Desmond for appellant. The defendant is not liable for the torts of its public officers while in the performance of duties connected with its public institutions, on the ground that the services performed in and about them are for the public good; in obedience to law, in which the defendant has no particular interest, and from which it derives no particular benefit in its corporate capacity; that neither the board of supervisors nor the officers elected or appointed by it to superintend these institutions are the agents or servants of the county of Monroe, but all of them act as officers charged with a public service for whose acts in the discharge of official duty no actions lie against the county. (*Markey v. County of Queens*, 154 N. Y. 675; 1 Dill on Mun. Corp. [4th ed.] §§ 23, 27, 963-965; *Hughes v. County of Monroe*, 147 N. Y. 49; *Maximilian v. Mayor, etc.*, 62 N. Y. 160; *Wehn v. Gage*, 5 Neb. 494; *Threadgill v. Anson County Comr.*, 99 N. C. 352; *Albrecht v. County of Queens*, 84 Hun, 399; *Alamango v. Supervisors of Albany Co.*, 25 Hun, 551; *Simmonds v. Clay Co.*, 71 Ill. 355; L. 1892, ch. 686, § 2; *Hollenbeck v. Winnebago Co.*, 95 Ill. 148; *Smith v. City of Rochester*, 76 N. Y. 510.)

J. A. Stull for respondent. The contention of the appellant that this action will not lie, or that the plaintiff is rene-
diless, is without merit. (*Anthony v. Adams*, 1 Met. 284; *Lawrence v. Fairhaven*, 5 Gray, 110; *Perry v. Worcester*, 6 Gray, 544; *Parker v. Lowell*, 11 Gray, 354; *Wheeler v. Worcester*, 10 Allen, 591; *Bigelow v. Inhabitants of Randolph*, 14 Gray, 544; *Bailey v. Mayor, etc.*, 3 Hill, 531; *Oliver v. Worcester*, 102 Mass. 489; *Neff v. Wellesley*, 148 Mass. 493; *Haskell v. New Bedford*, 108 Mass. 208.) To sustain the

contention of the appellant would result in depriving the plaintiff of the full use and enjoyment of his property without compensation, and so violate the spirit if not the letter of the Constitution, thus exalting the protection of the county above that of the state itself. (*Schussler v. Hennepin County Comrs.*, 67 Minn. 412; *Chester County v. Brower*, 117 Penn. St. 647; *Riddle v. Delaware County*, 156 Penn. St. 643.)

CULLEN, J. The action is brought to restrain the continuance of a nuisance and for damages. The complaint alleged ownership and occupation by the plaintiff of a tract of land in the town of Brighton, county of Monroe; that the defendant owned a tract of land near plaintiff's premises on which it maintained the county penitentiary and the county almshouse, and until the sale of a portion of the premises to the state, an insane asylum; that the defendant owned and possessed another tract of land or farm across the road from that first mentioned; that a stream ran along said lands, and also along those of the plaintiff; that the defendant discharged the night soil, offal and garbage from the penitentiary, almshouse and insane asylum into said stream until the year 1883 when, in an action brought against the board of supervisors of the defendant, it was restrained from further permitting sewage to run into the waterway; that after said time and until the commencement of the action sewage and night soil were spread over the farm or tract of land on the opposite side of the road from the buildings, and that thereby the defendant created a nuisance to the great damage of the plaintiff's land and stock. The answer admitted the ownership of the parcels of land described in the complaint and denied the other allegations therein contained. The cause was tried at Special Term, and the learned court found, as matter of fact, that the defendant had maintained the nuisance charged in the complaint, and awarded to the plaintiff \$600 for damages and an injunction perpetually enjoining and restraining the defendant from permitting any sewage or other foul or filthy matter from defendant's buildings or premises to run into the stream

mentioned, or to flow in any way over or past the lands of the plaintiff in such manner as to pollute the air thereon or the waters of the stream. The judgment entered on this decision was unanimously affirmed by the Appellate Division.

We are, therefore, confined in our examination to the question whether the facts, as found, sustain the conclusions of law, and to the consideration of any legal errors duly raised by exceptions as to the reception or rejection of evidence.

The facts alleged in the complaint and found by the court show, conclusively, that the county of Monroe acted in the premises in its governmental capacity, and it consequently follows that the conclusions of law based thereon holding it liable in damages to the plaintiff cannot be sustained.

It is clearly alleged and found that the county of Monroe for twenty years has been the owner and in possession of certain lands on which are located the penitentiary, almshouse and, prior to 1892, the Monroe county insane asylum; also, a farm of about sixty acres opposite the above premises on which have been constructed two large tanks or reservoirs, into which are introduced pipes running from said buildings conducting the sewage thereof, except the night soil of the penitentiary.

Few questions have given rise to more diversity of judicial opinion or greater conflict in judicial decisions than that of the liability of municipal corporations for the acts of their officers or servants. In every state in this country, as far as we know, that follows the common law, distinction is drawn between the class of cases in which the municipality is held liable for the torts of its agents and those in which it is held exempt. But not only the grounds on which the distinction is placed, but the line of cleavage itself between liability and non-liability differs greatly in different jurisdictions. Which distinction is the sound one, and whether any distinction will logically stand the test of final analysis, has been questioned. Nevertheless, in this state the rule governing the liability or non-liability of a municipal corporation has for the past twenty-five years been settled by an unbroken line of authority,

although there have been at times differences of opinion as to the application of the rule. In *Maximilian v. Mayor* (62 N. Y. 160) there was stated the broad general doctrine that two kinds of duties are imposed on municipal corporations, the one governmental and a branch of the general administration of the government of the state, the other, *quasi* private or corporate; that in the exercise of the latter duties the municipality is liable for the acts of its officers or agents, while in the former it is not. It was there held that the care and custody of criminals and paupers imposed on the commissioner of charities of the city of New York was governmental, not corporate, and that the city was not liable for the negligence of the employees of that board. This doctrine has been steadily adhered to by this court. (*Ham v. Mayor, etc.*, 70 N. Y. 459; *New York & Brooklyn Saw Mill & Lumber Co. v. City of Brooklyn*, 71 N. Y. 580; *Hughes v. County of Monroe*, 147 N. Y. 49; *Springfield Fire & M. Ins. Co. v. Village of Keeseville*, 148 N. Y. 46.) In the *Hughes* case it was unsuccessfully sought to hold this defendant liable for an accident occurring to an employee in the insane asylum on the same premises in reference to which the present suit is brought. Judge BARTLETT there said: "In *Maximilian v. The Mayor* this court laid down the rules that control this case."

It is also to be remembered that the responsibility of this defendant for the acts of its officials is not the same as that which obtains in the case of ordinary municipal corporations. If the defendant was not liable for the negligence of the officers in control of the penitentiary and almshouse prior to the County Act of 1892, it is not rendered liable by that act. In *Markey v. County of Queens* (154 N. Y. 675) this court held that the county was not liable for an injury occasioned by a defective bridge, with the maintenance of which the county was charged. It is sought to distinguish this case from those cited, in that here the county owns a farm which it is claimed it possesses as an ordinary proprietor and subject to the latter's duties and liabilities as to his neighbors. The same point was raised in the *Hughes* case, but the court held that

the farm was a mere incident to the maintenance of the paupers and the insane. Neither the complaint, findings, nor the judgment rendered by the court is confined to the farm; they relate to the management of the public buildings.

The learned court below was of opinion that the judgment could be upheld on the doctrine which prevails in the state of Massachusetts, and is stated in *Hill v. City of Boston* (122 Mass. 344). Substantially, the doctrine is that municipal corporations are not liable for negligence or misconduct in the performance of their corporate duties to persons interested in such performance, but are liable to third parties whose property rights are invaded. This rule has the merit of great clearness and easy application, but is not consistent with the decisions in this state. It would relieve the municipality from the liability for defective streets which exists with us (*Weet v. Village of Brockport*, 16 N. Y. 161) and would have rendered the municipality liable, probably, in *Maximilian v. Mayor, etc.* (*supra*), and certainly in *Ham v. City of New York* (*supra*), in which cases it was held to be exempt.

Under the authority of the line of cases cited from this court we feel constrained to reverse this judgment. But the plaintiff is not, and has not been, without remedy. He could at any time maintain an action against the board of supervisors and the officers in the control of the public buildings and have the further continuance of the nuisance enjoined. Such a proceeding brought against specific officials who might be summarily dealt with, in case of disobedience of the judgment of the court, would be fully as efficient as a judgment against the county in its corporate character. The complaint discloses that in two actions by third parties against the board of supervisors, prior to the present suit, the plaintiffs were successful.

The judgment should be reversed and complaint dismissed, but without costs in any court.

PARKER, Ch. J., GRAY, BARTLETT and WERNER, JJ., concur; MARTIN and VANN, JJ., dissent.

Judgment reversed, etc.

JAMES HULL, Appellant, v. LUCIUS N. LITTAUER et al.,
Respondents.

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WITNESS—WHEN CREDIBILITY OF PARTY IS A QUESTION OF LAW. The rule that the credibility of a witness who is a party to the action must be submitted to the jury is not an absolute and inflexible one, and where his evidence is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and is not improbable, nor in its nature surprising or suspicious, there is no reason for denying to it conclusiveness; hence, where one of the defendants, in an action for goods sold, testified that the contract was entire and had been performed only in part, and his testimony is not contradicted or discredited, a verdict in their favor is properly directed by the trial court.

Hull v. Littauer, 8 App. Div. 227, affirmed.

(Argued March 19, 1900; decided May 1, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered July 7, 1896, affirming a judgment in favor of defendants entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

Clark L. Jordan for appellant. The direction of a verdict on the uncorroborated testimony of a party, or one interested in the event, is error. (*Kavanagh v. Wilson*, 70 N. Y. 177; *Leavitt v. Dodge*, 41 N. Y. S. R. 581; *Honegger v. Wettstein*, 94 N. Y. 252; *Spingarm v. Rosenfeld*, 4 Misc. Rep. 523; *Stone v. Flower*, 47 N. Y. 566; *Eisenlord v. Clum*, 67 Hun, 518; *Witcher v. Holland W. W. Co.*, 66 Hun, 619; *Potts v. Mayer*, 74 N. Y. 594.) The defense that the plaintiff had failed to deliver the entire quantity sold by Tollman to the defendants is sustained only by the testimony of the interested parties. That testimony is contradicted, and raised an issue which should have been submitted to the jury. (*M. C. Works v. Schad*, 38 Hun, 71; *Gildersleeve v. Landon*, 73 N. Y. 609; *Roseberry v. Nixon*, 58 Hun, 121.)

Edgar A. Spencer for respondent. The court did not direct a verdict on the uncorroborated testimony of an interested person. (1 Phillips on Ev. [Edwards' ed.] 14.) It is not always error for the trial court to direct a verdict on the uncorroborated testimony of a party interested in the event. (*Kelly v. Burroughs*, 102 N. Y. 93; *Elwood v. W. U. T. Co.*, 45 N. Y. 549; *Lomer v. Meeker*, 25 N. Y. 361; *L. Nat. Bank v. Kirk*, 41 N. Y. Supp. 15; *Johnson v. Doll*, 32 N. Y. Supp. 135.) If the trial court had submitted the question to the jury as to the credibility of the testimony of the defendant Littauer, and the jury had found for the plaintiff, it would have been the duty of the court to have set the verdict aside. (*Denton v. Carroll*, 4 App. Div. 535.)

GRAY, J. The issue between the parties was whether there had been an entire contract for the sale of 20,609 feet of a certain description of dressed leather, known as "yellow kip," as alleged by the defendants in their answer to the complaint. The plaintiff had sued the defendants as upon a sale and delivery to them, at the agreed price of seven cents per foot, of the leather which he had on hand at a certain date, amounting to 15,164 feet. If the agreement for the sale of the leather was as claimed by the defendants, then the failure to perform it by the delivery of the full amount was a perfect defense to the action. If there had been one bargain between vendor and purchaser for the sale and delivery of 20,609 feet of leather, then no right of action accrued to the former for the price, until he had fully performed on his part.

Upon the trial, the plaintiff testified that, as agent for the Western Tannery Company, he had delivered to the defendants, at their factory in Gloversville, 15,164 feet of this description of leather, at seven cents a foot. This price for the leather he proved by stating what one of the defendants had, upon a previous trial of the action, testified to as the price agreed upon with Tolman, the manager of the Western Tannery Company. Having testified to the delivery of the leather, to the price per foot and to the assignment to him by

the tannery company of its claim against the defendants, the plaintiff rested his case. For the defendants, one of them testified that he had looked over a quantity of the leather which Tolman had at the plaintiff's storehouse, in Gloversville, and that when, subsequently, Tolman called upon him in New York and desired to sell the lot, he agreed to purchase it. He said that, at the time, Tolman showed him two papers, which were in this plaintiff's handwriting; one of which was a letter from plaintiff to Tolman, referring to a memorandum inclosed of the amount of leather on hand, and the other was the memorandum, showing the number of feet of leather, in detail. Tolman called off the number of feet and witness made a memorandum of them, aggregating 20,609 feet, and of the price, being seven cents per foot, which the former pronounced correct. A week later, when in Gloversville, the witness Littauer said that he found that a portion only of the leather had been delivered at his factory. He, thereupon, demanded of plaintiff the delivery of the balance of the skins which he had bought; but he was told that it was all that he would get. The defendants subsequently wrote to the plaintiff that as his delivery of the leather was short by upwards of 5,000 feet of the amount of their purchase, they had notified his principal of the fact and that Tolman, in reply, had stated that he had ordered the delivery of all the skins which had been sold; and they declined to pay a bill which plaintiff had rendered them until the matter was adjusted. The superintendent of the defendants testified to receiving a letter from them, after their transaction with Tolman, and to showing it to him at the plaintiff's storehouse in Gloversville, and that, after calling his attention to the number of feet of leather stated as sold, he replied, "yes, that is right, they are over there." A witness for the defendants, who had been book-keeper for the plaintiff at the time, testified that there were about 20,000 feet of the leather in the plaintiff's storehouse, which Tolman told him he had sold to the defendants. The same witness, also, stated that before the plaintiff made any delivery of the leather, he had caused it to be sorted in piles

and a quantity of the better grade of skins, amounting to some 4,000 or 5,000 feet, was kept back. Upon the conclusion of the defendants' case, the plaintiff was recalled and denied the sorting of the leather in grades, or that any skins were kept back at the time; but he gave no further evidence respecting the transaction of sale. The defendants moved for the direction of a verdict in their favor, upon the ground that the plaintiff had not performed the contract, and the plaintiff asked to go to the jury, upon the ground that the proof as to the contract rested upon the evidence of interested parties. The trial court held that the contract was an entire one and directed a verdict for the defendants; which direction was excepted to by the plaintiff.

It is true that the evidence to establish the entirety of the contract was given by the defendants; but the rule which the plaintiff invokes is not applicable to such a case as this. Generally, the credibility of a witness, who is a party to the action and, therefore, interested in its result, is for the jury; but this rule, being founded in reason, is not an absolute and inflexible one. If the evidence is possible of contradiction in the circumstances; if its truthfulness, or accuracy, is open to a reasonable doubt upon the facts of the case, and the interest of the witness furnishes a proper ground for hesitating to accept his statements, it is a necessary and just rule that the jury should pass upon it. Where, however, the evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities; nor, in its nature, surprising, or suspicious, there is no reason for denying to it conclusiveness. Though a party to an action has been enabled, since the legislation of 1857, (Ch. 353, Laws of 1857), to testify as a witness, his evidence is not to be regarded as that of a disinterested person and whether it should be accepted without question, depends upon the situation as developed by the facts and circumstances and the attitude of his adversary. In *Lomer v. Meeker*, (25 N. Y. 361), where the defense to an action upon a promissory note was usury and the indorser gave the evidence to estab-

lish it, without contradiction, it was said that "it was the duty of the court, in such case, to dismiss the complaint, or nonsuit the plaintiff, or direct a verdict for the defendants. It is a mistake to suppose that, because the evidence came from the defendant, after the plaintiff had rested, the case must go to the jury. * * * The argument is, that this could not properly be done, because there was a question of credibility raised in respect to the witness Bock, who proved the usury. But this objection is untenable. The witness was not impeached or contradicted. His testimony is positive and direct, and not incredible upon its face. It was the duty of the court and jury to give credit to his testimony." More recently, in *Kelly v. Burroughs*, (102 N. Y. 93), Judge DANFORTH, after observing that, as the facts were not disputed, there was no occasion to present them to the jury, said "the mere fact that the plaintiff, who testified to important particulars, was interested was unimportant in view of the fact that there was no conflict in the evidence, or any thing or circumstance from which an inference against the fact testified to by him could be drawn."

In the present case, it is to be remembered that the plaintiff gave no evidence with respect to the agreement for the sale of the goods, and to prove their price relied upon the former testimony of one of the defendants with respect to it; thus accrediting him, in a measure. Tolman, who had made the sale to the defendants, might have given his version of the agreement, if at variance with what was claimed by the defendants; but he was not put upon the witness stand and, thus, the only evidence as to the contract was given by the defendants. There was nothing to contradict, or to discredit, his evidence. Those circumstances were sufficient to distinguish the case and to take it from without the operation of the general rule. If this position were not true, then the rule might be reduced to an obvious absurdity, in its consequences, and verdicts might be rendered only to be set aside as against evidence.

We might go further, if it were necessary, and say that the

defendant's evidence was not without corroboration. That there was some contract for the sale of leather is, of course, a necessary inference from the plaintiff's action, and as to its being what that one of the defendants, who made the purchase, testified to, there was the testimony of his superintendent as to Tolman's acknowledgment to him of the correctness of the statement in defendants' letter respecting the sale and of the goods being on hand. We have, furthermore, the pregnant circumstance that, just prior to the transaction of sale, the plaintiff had stated in a letter to Tolman the amount of leather on hand at Gloversville, which must have been intended to be used as the basis for a sale by Tolman, and which furnished the data for defendants' memorandum.

I think the judgment below was right and no other questions require discussion. The judgment appealed from should be affirmed, with costs.

PARKER, Ch. J., BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ., concur.

Judgment affirmed.

BERTHA JANNECK, Respondent, v. THE METROPOLITAN LIFE
INSURANCE COMPANY, Appellant.

1. LIFE INSURANCE — AMBIGUOUS POLICY CONSTRUED MOST STRONGLY AGAINST INSURER. Where the language of an insurance contract is so ambiguous as to render it susceptible of two interpretations it should be construed most strongly against the insurer, because the latter has prepared the contract and is responsible for the language used.

2. CONSTRUCTION OF AMBIGUOUS CLAUSE AS TO RIGHT TO TERMINATE CONTRACT. A stipulation contained in a policy issued by a life insurance company to the effect that "Should the life insured * * * become so intemperate as to impair his health, * * * said company shall have the unquestioned right, upon becoming satisfied of such fact, to terminate this contract immediately upon the tender to the party in interest of the legal reserve, as hereinbefore described," makes the insurer's right to terminate the contract dependent upon the existence of the fact which is relied upon to terminate it, and gives the insurer no arbitrary right to terminate merely because it has itself become satisfied of the fact.

Janneck v. Met. Life Ins. Co., 13 App. Div. 514, affirmed.

(Argued March 15, 1900; decided May 1, 1900.)

APPEAL from a judgment and order of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 30, 1897, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Eugene Van Voorhis for appellant. The court erred in denying the defendant's motion for the direction of a verdict. (*Butler v. Tucker*, 24 Wend. 447; *Sweet v. Morrison*, 116 N. Y. 19; *McAuley v. Carter*, 22 Ill. 53; *Downey v. O'Donnell*, 86 Ill. 49; *Tyler v. Ames*, 6 Lans. 280; *Spring v. A. Clock Co.*, 24 Hun, 175; *Hart v. Hart*, 22 Barb. 606; *McCarran v. McNulty*, 7 Gray, 139; *Zaleski v. Clark*, 44 Conn. 218; *Brown v. Foster*, 113 Mass. 136.) The refusal of the court to charge that the true construction of the policy is, that if the defendant became satisfied of the fact that the insured had become so intemperate as to impair his health, and acted in good faith, it had a right to cancel the policy, was error. (*Russell v. Allerton*, 108 N. Y. 288; *Crawford v. M. & E. Pub. Co.*, 9 App. Div. 481.)

George F. Yeoman for respondent. The contention that the defendant may cancel the policy simply because it is satisfied that the insured was so intemperate as to impair his health, without reference to whether or not it was a fact that he was so intemperate, is untenable. (*Baley v. H. F. Ins. Co.*, 80 N. Y. 21; *Halpin v. Ins. Co. of N. A.*, 120 N. Y. 73; *D. S. Boiler Co. v. Garden*, 101 N. Y. 387; *Russell v. Allerton*, 108 N. Y. 288.)

WERNER, J. This action was brought upon a life insurance policy for one thousand dollars, issued by the defendant on the 5th day of July, 1890, upon the life of one Charles Janneck, and payable to the plaintiff, the beneficiary therein named. The plaintiff recovered a verdict in the trial court,

and the unanimous affirmance in the Appellate Division of the judgment thereon precludes us from looking into the evidence to see whether it supports the verdict.

The only exceptions of sufficient importance to require discussion are those which arise upon the construction of the following clause of said policy: "*Should the life insured be convicted of a felony, or become so intemperate as to impair his health, or to induce delirium tremens, said company shall have the unquestioned right, upon becoming satisfied of such fact, to terminate this contract immediately upon the tender to the party in interest of the legal reserve, as hereinbefore described.*" The defendant acting upon information from which it became satisfied that the insured had become so intemperate as to impair his health, tendered to the beneficiary the legal reserve which had accrued upon said policy and notified her in writing that the contract was terminated. The plaintiff refused to accept the legal reserve thus tendered or to regard the contract as terminated, and periodically tendered to the defendant the premiums upon such policy as they became due until the death of the insured.

Under these conditions the plaintiff contends, and the courts below have held, that the language of the policy above quoted did not give the defendant the arbitrary right to terminate the contract, and that such right depends upon the existence of the fact which is relied upon to terminate it. It cannot be denied that it was entirely competent for the parties to make a contract which the insurer would have the unquestioned right to terminate at will. Did they make such a contract? The answer to this question must be found in such a construction of the language used as will effectuate the fair intent and meaning of the contract. In considering insurance contracts courts should be guided by two cardinal rules of universal application. The first is, that when the language is clear and unequivocal, the contract should be enforced according to its terms, without regard to the equitable considerations which may be urged in avoidance of it. The second is, that when the language of an insurance contract is so ambiguous as to render

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it susceptible of two interpretations, it should be most strongly construed against the insurer, because the latter has prepared the contract and is responsible for the language used. (*Kratzenstein v. Western Assur. Co.*, 116 N. Y. 59; *Allen v. St. Louis Ins. Co.*, 85 N. Y. 473; *Herrman v. Merchants' Ins. Co.*, 81 N. Y. 184.) With these rules in mind let us analyze the language above referred to: "Said company shall have the unquestioned right, upon becoming satisfied of *such fact*, to terminate this contract," etc. What fact? Obviously the fact of conviction of a felony or of such a degree of intemperance on the part of the insured as to impair his health. The sentence begins, "*Should the life insured be convicted of a felony, or become so intemperate as to impair his health or induce delirium tremens,*" etc. We think this language assumes the existence of *the fact* as an essential pre-requisite to the exercise of the right reserved. Upon becoming satisfied of "*such fact*" and not otherwise has the insurer the right to terminate the contract. Let us suppose that the insurer in a given case should be, or claim to be, satisfied that the insured had been convicted of a felony, and should thereupon terminate the policy. Suppose further that the insured had not been convicted at all, or had only been convicted of a misdemeanor. Could the insurer in such a case successfully maintain that it had properly exercised its right to terminate and cancel the contract? We think not. Let us assume that the insured had never even tasted intoxicating liquors, and that the insurer had information from which it became satisfied that the insured had become so intemperate as to impair his health, and thereupon the insurer had proceeded to cancel the policy. Can it be seriously urged that such cancellation would clearly be supported by the language of this contract? In answering this inquiry in the negative, we do not deny the right of an insurance company to make just such a contract as the defendant claims to have made in the present instance. But insurance contracts, above all others, should be clear and explicit in their terms. They should not be couched in language as to the construction of

which lawyers and courts may honestly differ. In a word, they should be so plain and unambiguous that men of average intelligence who invest in these contracts may know and understand their meaning and import.

It would have been perfectly simple for the insurer to have said that whenever it becomes satisfied that the insured has been convicted of a felony, or has become so intemperate as to impair his health, it should have the unquestioned right to terminate the contract, even though it should transpire that it had acted on mistaken information, or without evidence. But this the insurer did not say. On the contrary, it has used language which strongly indicates an intention to make the existence of the fact the test of the right to cancel the contract. We think the most favorable construction of this language to which the insurer is entitled leaves its true meaning in doubt, and under the rule above adverted to, that doubt should be resolved in favor of the insured. We, therefore, conclude that the defendant's exception to the refusal of the trial court to direct a verdict in its favor, and to the refusal of the court to instruct the jury that the defendant's construction of the contract was the true one, were not well taken, and that the judgment of the court below should, therefore, be affirmed, with costs.

PARKER, Ch. J. (dissenting). The trial court charged the jury: "There is really but one question presented for your consideration upon the issues, and that is whether by the terms of the policy the insured during his lifetime became so intemperate as to impair his health," and, further, that the burden was on the defendant company of establishing the affirmative of the proposition. This view is about to receive the approval of this court, and as I am unable to unite in it my reasons for dissenting will be briefly given.

The policy of insurance contains the following provision: "Should the life insured be convicted of a felony, or become so intemperate as to impair his health or induce delirium tremens, said company shall have the unquestioned right,

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upon becoming satisfied of such fact, to terminate this contract immediately upon the tender to the party in interest of the legal reserve as hereinbefore described." The answer alleged, and the defendant proved, that it caused the habits of Charles Janneck to be investigated in October, 1893; that the report of the results of such investigation satisfied the defendant, on October 28, 1893, that the assured had become so intemperate as to impair his health, and on October 31, 1893, it caused to be tendered to the party in interest the amount of the legal reserve pursuant to the foregoing provision of the policy, and gave notice that it had terminated the policy. The assured died in August, 1894. It is not questioned, of course, that it was competent for the parties to the contract to agree that intemperance which should be so great as to impair the health of the insured should be treated as a sufficient cause for the termination of the policy, that the company should have the right to determine that question, and that its determination, if made in good faith, should be final. But while it is conceded that the parties were competent to make such a contract, and that one of them at least attempted to do so, it is said that they did not succeed. In other words, that while the language employed in the provision quoted tends in that direction, it is not by it so clearly and emphatically expressed as to call upon the court to give such a construction to it, and the necessary result is that the provision becomes meaningless and serves no purpose whatever. It seems to me quite clear that the parties agreed that should the life of the insured become so intemperate as to impair his health the company should have the right — yes, "the unquestioned right," provided it first became "satisfied of such fact" — to do what? "To terminate this contract." When? "Immediately." On what condition? "Upon the tender of the legal reserve." It seems to me that a reasonable construction of this language requires us to hold that the parties did provide a method by which the defendant company could terminate the contract in the contingency provided for, which could only be brought into existence by the conduct of the

insured. The defendant having offered evidence tending to show that such a contingency arose and that after an investigation it became satisfied that the fact was that the insured had become so intemperate as to impair his health, and having thereupon canceled the policy and tendered back the amount of the legal reserve, under the evidence in this case there was but one question for the jury, and that was whether the defendant in what it did acted in good faith. The learned counsel for the defendant asked the court so to rule and to submit that question as the only question to the jury, but his request was refused, and the exception taken would lead to a new trial if the contract should receive the construction I have suggested.

BARTLETT, MARTIN, VANN and CULLEN, JJ., concur with WERNER, J., for affirmance; GRAY, J., concurs with PARKER, Ch. J.

Judgment affirmed. _____

AMELIA C. SMALDONE, Respondent, v. THE PRESIDENT AND DIRECTORS OF THE INSURANCE COMPANY OF NORTH AMERICA OF PHILADELPHIA, PENNSYLVANIA, Appellant.

FIRE INSURANCE — WAIVER OF SERVICE OF PROOFS OF LOSS. An agent of a fire insurance company, authorized to adjust the amount of a loss and empowered to negotiate any settlement of the claim of the insured and to pay and discharge it, is, under such circumstances, a general agent, and his waiver of service of proofs of loss will bind the company, although such waiver was not indorsed upon the policy as therein required.

Smaldone v. Ins. Co. of N. A., 22 App. Div. 633, affirmed.

(Argued March 23, 1900; decided May 1, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered December 10, 1897, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

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Points of counsel.

Samuel S. Hatt for appellant. The furnishing of proofs of loss, as required by this policy, was a condition precedent to plaintiff's right of recovery. (*Titus v. G. F. Ins. Co.*, 81 N. Y. 411; *Blossom v. L. F. Ins. Co.*, 64 N. Y. 162; *Quinlan v. P. W. Ins. Co.*, 133 N. Y. 356.) Under the limited and restricted power upon agents as to waiving any condition of the policy, the trial court erred in allowing plaintiff to show the oral waiver by Scotland as to the service of proofs of loss and appraisal. (*Messelback v. Norman*, 122 N. Y. 583; *Quinlan v. P. W. Ins. Co.*, 133 N. Y. 356; *Moore v. H. F. Ins. Co.*, 141 N. Y. 219; *Baumgartel v. P. W. Ins. Co.*, 136 N. Y. 547.) The trial judge erred in charging the jury that Scotland stood in the place of the company, and that if the jury found that he stated that plaintiff need not file proofs of loss it was a waiver of the terms of the policy in that regard by the company. (*Quinlan v. P. W. Ins. Co.*, 133 N. Y. 356; *O'Brien v. P. Ins. Co.*, 134 N. Y. 28; *Blossom v. L. F. Ins. Co.*, 64 N. Y. 165; *Armstrong v. A. Ins. Co.*, 130 N. Y. 560; *Moore v. H. F. Ins. Co.*, 141 N. Y. 219; *Baumgartel v. P. W. Ins. Co.*, 136 N. Y. 547; *Mason v. H. Ins. Co.*, 37 U. C. [Q. B.] 437; *Q. Ins. Co. v. Young*, 5 South. Rep. 117; *Norman v. Ins. Co.*, 4 Ins. L. J. 827; *Michael v. Eley*, 61 Hun, 180.)

T. F. Hamilton for respondent. Stipulations which relate to procedure merely, after the occurrence of a loss, are to be reasonably and not rigidly construed. (*Paltrovitch v. P. Ins. Co.*, 143 N. Y. 73.) An insurance company may orally waive the service of proofs of loss. (*Lowry v. L. Ins. Co.*, 32 Hun, 329; *Craighton v. A. Ins. Co.*, 39 Hun, 319; *Smith v. H. Ins. Co.*, 47 Hun, 30; *Titus v. G. F. Ins. Co.*, 81 N. Y. 411.) Defendant specifically waived the condition in the policy requiring the submission of the proofs of loss. (*Kiernan v. D. C. M. Ins. Co.*, 150 N. Y. 190.) Defendant is estopped from enforcing the provision in the policy requiring the insured to present written proofs of loss. (*Aldrich v. H. Ins. Co.*, 20 Wkly. Dig. 70; *Bishop v. A. Ins. Co.*,

130 N. Y. 488; *Sharpe v. M. M. Ins. Co.*, 8 App. Div. 354; *McGuire v. H. F. Ins. Co.*, 7 App. Div. 576; *P. Ins. Co. v. Munger*, 49 Kans. 178; *Idé v. P. Ins. Co.*, 2 Biss. 333; *S. Ins. Co. v. Fay*, 22 Mich. 467; *Sergeant v. L. & L. & G. Ins. Co.*, 155 N. Y. 349; *McNally v. P. Ins. Co.*, 137 N. Y. 389; *G. El. Co. v. L. & L. & G. Ins. Co.*, 159 N. Y. 418.)

CULLEN, J. The action is brought on a standard fire insurance policy, and the only question raised on this appeal is as to the power of an agent sent by the defendant to adjust the loss to waive the provision of the policy requiring the service of proofs of loss. This agent was not only authorized to adjust the amount of the loss, but, as appears by his own testimony, was empowered to negotiate any settlement of the claim of the insured on the policy and to pay and discharge such claim. Shortly after the occurrence of the fire, and before the expiration of the time within which it was necessary to serve the proofs of loss, the agent, in his negotiations with the plaintiff's assignor and his attorney, absolutely repudiated any liability on the part of the defendant, claiming that the premises insured were vacant in contravention of the terms of the policy, though he seems to have been willing to have settled with the insured if he could do so for a sufficiently small sum. The parties could not agree on the amount to be paid, when, as testified by the plaintiff's witnesses and as found by the jury, the agent told the attorney for the insured that he did not want him to file proofs of loss or have appraisers appointed, but that he might "go on and sue as soon as you wish to." The defendant requested the court to instruct the jury that the agent had no power to waive the requirement for service of the proofs of loss unless it was indorsed upon the policy. This request was refused and the court charged the jury that if the agent waived the service of the proofs of loss and the appointment of appraisers his act bound the defendant.

We think that this ruling of the trial court was correct. It is not necessary to review the many cases to be found in this

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state on the power of agents to waive the conditions or requirements of insurance policies. There is no necessary inconsistency in the decisions of this court on the subject. The determination of the question depends on the rank and authority of the agent and the subject-matter with reference to which he assumes to act. We have recently held (*Hicks v. British Am. Ass. Co.*, 162 N. Y. 284) that a local agent authorized to issue policies could not, by his declarations or acts, waive the provision of a policy that proofs of loss must be furnished. The agent in this case, however, was not a local agent, but was vested with plenary powers to adjust the defendant's liability and pay any claim that might be made against it. As to the matter in hand, he was a general agent, not a special agent or one with limited authority, and could do whatever the company itself might do. It is unquestionable that he could have paid the loss without the production of any proofs of loss; equally, he could repudiate all liability on the part of the defendant and waive the proofs of loss or appointment of appraisers. The question seems settled by the late decision of this court in *Sergeant v. Liverpool & L. & G. Ins. Co.* (155 N. Y. 349, 355), where it is said through BARTLETT, J., that "While it is true that the policy in suit contained the usual clause as to proofs of loss being filed within sixty days, and that no officer, agent or other representative of the company should have power to waive any condition thereof, except by written agreement indorsed thereon, yet, a party to a contract containing such a provision may, by conduct, estop himself from enforcing it against one who has acted in reliance upon such conduct. He may also be estopped by the act of an agent who possesses, or whom he has held out to possess, this power in respect to the provision." In that case the court followed its previous decision in *Bishop v. Agr. Ins. Co.* (130 N. Y. 488).

The judgment should be affirmed, with costs.

PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN and WERNER, JJ., concur.

Judgment affirmed.

RICHARD HUFFMIRE et al., Respondents, v. THE CITY OF
BROOKLYN, Appellant.

1. PARTIES. The town of Flatbush, by chapter 856 of the Laws of 1894, having been merged in the city of Brooklyn, the city is a proper party defendant to any action which might have been brought against the town before the merger.

2. LIABILITY FOR DESTRUCTION OF OYSTER BED BY THE DISCHARGE OF SEWAGE THEREON. A right to plant an oyster bed under public waters within the town of Flatlands, and gather oysters therefrom, acquired under the statute (L. 1868, ch. 734), is private property and the destruction of the bed by sewage discharged thereon from a sewer of a town is a direct invasion of a private right and taking of private property within the meaning of the Constitution, although the sewer was constructed by the town under legislative authority (L. 1889, ch. 161); and the city of Brooklyn, having succeeded to the property and liabilities of the town, is liable in an action for damages for such injury.

Huffmire v. City of Brooklyn, 22 App. Div. 406, affirmed.

(Argued March 22, 1900; decided May 1, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 3, 1897, affirming a judgment in favor of plaintiffs entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

John Whalen, Corporation Counsel (William J. Carr of counsel) for appellant. The statute having authorized the construction of the sewer and the discharge of its contents into the tide waters, no liability could attach to the town of Flatbush without proof of fault either in the method of construction or maintenance of the sewer built under such legislative sanction. (*Radcliff v. Mayor, etc.*, 4 N. Y. 196; *Bellinger v. N. Y. C. R. R.*, 23 N. Y. 47; *Atwater v. Trustees*, 124 N. Y. 602; *B. Gas Co. v. Brunswick*, 92 Me. 493; *Booth v. R., W. & O. R. R. Co.*, 140 N. Y. 267; *Morton v. Mayor, etc.*, 140 N. Y. 207; *Hill v. Mayor, etc.*, 139 N. Y. 495; *Morsfield v. City of Worcester*, 110 Mass. 216; *W. M. Co. v. City of Worcester*, 116 Mass. 148.)

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Frederick E. Crane for respondents. While an act of the legislature authorizing a public improvement may protect a municipality from liability for consequential injuries, it does not protect it from liability for the direct, actual and physical taking of property. (*Carll v. Vil. of Northport*, 11 App. Div. 121; *Magee v. City of Brooklyn*, 18 App. Div. 22; *Moody v. Vil. of Saratoga Springs*, 17 App. Div. 207; *Byrnes v. City of Cohoes*, 67 N. Y. 204; *Seifert v. City of Brooklyn*, 101 N. Y. 136; *Noonan v. City of Albany*, 79 N. Y. 470; *Moore v. City of Albany*, 98 N. Y. 407; *N. Y. C. & H. R. R. R. Co. v. City of Rochester*, 127 N. Y. 591; *Hay v. Cohoes Co.*, 2 N. Y. 159.) The act of 1889, authorizing the town of Flatbush, through commissioners, to construct the sewer, did not authorize the taking or destruction of private property or property rights without just compensation. (*Morton v. Mayor, etc.*, 140 N. Y. 207; *Hill v. Mayor, etc.*, 139 N. Y. 495.)

WEBNER, J. This action was brought to recover damages to a bed of oysters planted by the plaintiffs in Mill creek, which is tide water bordering upon that portion of the city of Brooklyn formerly known as the town of Flatlands, Kings county, N. Y.

These oysters were planted under a permit issued to the plaintiffs by the justice of the peace and the supervisor of said town of Flatlands, pursuant to the provisions of chapter 734 of the Laws of 1868. This act, in substance, provides that any person who has been an inhabitant of the town for a period of six months prior to making application may, upon complying with the provisions of the act, acquire the right to plant oysters under the public waters within said town, and have "the exclusive property in the oysters so planted and the exclusive use of said oyster beds." The first permit received by the plaintiffs was issued in December, 1882. The rental or license fee was ten dollars a year. This permit was renewed from year to year until 1892, when the plaintiffs omitted to procure a formal renewal thereof, but continued to plant and gather oysters as before.

On the 9th of February, 1893, the plaintiffs paid twenty dollars, which included the rental for 1892, and renewed their permit until December, 1893. The damage to plaintiffs' oyster bed was caused by the discharge of sewage thereon from one of defendant's sewers. The history of this sewer, and its relation to this controversy, is as follows: By chapter 161, Laws of 1889, the legislature authorized the town of Flatbush to build a sewer to empty into the waters of Jamaica bay, of which Mill creek is a part. This sewer was constructed so that its outlet was about 300 feet from plaintiffs' oyster bed, and was first used in January, 1893. Soon after it was in operation the plaintiffs discovered that their oysters were covered with and ruined by tar and "sludge acid;" substances which were being discharged from the mouth of said sewer. The town of Flatbush constructed the sewer in question; but, by chapter 356 of the Laws of 1894, said town was annexed to and became a part of the city of Brooklyn, being designated as the twenty-ninth ward thereof. Section 4 of said act provides that the city of Brooklyn shall not be or become liable to pay "*any debt, liability or obligation of the town of Flatbush * * * contracted or incurred prior to the time this act shall take effect * * * but the property in such town * * * as now constituted * * * shall remain liable for said debts, liabilities and obligations, and the moneys to meet the same, principal and interest as they accrue, shall be raised by taxation upon the property of said town.*"

The act further provides that the taxes levied for these purposes, when collected by the city of Brooklyn, shall be paid over to the county treasurer or other proper officers charged with the duty of paying such indebtedness, and exempts the territory above described from certain general city taxes.

The first question presented for our consideration, although not seriously urged upon the argument, is whether the city of Brooklyn is the proper defendant in such a case as this. As this action was not brought until after the town of Flatbush had become merged in the city of Brooklyn, the latter is

undoubtedly the proper party defendant in any case which might have been brought against the former before such merger. Where a municipal corporation is legislated out of existence, and its territory annexed to another, the latter, unless the legislature otherwise provides, is entitled to the property and liable for the debts of the former. (Dillon on Municipal Corporations [4th ed.] section 186.) The provisions of chapter 356, Laws of 1894, limiting and defining the liability of the defendant for debts and obligations of the town of Flatbush prior to its annexation to the city of Brooklyn, were simply intended to confine the area of taxation for such debts and obligations to the territory which would have been liable but for such annexation. This is made clear by other provisions of the same act exempting the territory annexed from the payment of certain taxes levied for the exclusive benefit of the city of Brooklyn as it was constituted prior to 1874. Any other construction of the annexation act referred to would leave remediless those having lawful claims against the former town of Flatbush. That town no longer exists. By the act of 1894 it became a part of the city of Brooklyn, and the latter is now the only legal entity which can be brought into a court of justice upon claims against the former.

We, therefore, address ourselves to the principal question which arises upon defendant's contention that it is not liable in any event. It seeks to shield itself from liability herein by the application of the rule that in the construction or operation of a public work under legislative authority or direction, a municipal corporation is not answerable for such a consequential injury as may result to others where there is no negligence in such construction or operation.

We recognize the controlling force of this familiar and now well-settled principle. It is founded upon the transcendent power of the legislature, within constitutional limitations, to enact whatever it may deem essential to the public welfare. The question which most frequently arises in cases where this rule is invoked, is whether the injury complained of is purely consequential, or is so direct as to amount to a taking of prop-

erty which entitles the party injured to compensation under the Constitution. That is the precise question here presented. The plaintiffs contend that the casting of noxious and destructive substances upon their oyster bed was not a consequential but a direct injury. The defendant insists that the discharge of the sewer in question into the waters of Mill creek is simply the consequential result of obedience to the legislative mandate; and that in the absence of negligence on the part of the municipal authorities in the construction and operation of said sewer, the defendant is not liable. Applying the rule which the defendant invokes in all its force and breadth, we think this case falls directly within the constitutional inhibition against the taking of property without compensation. The plaintiffs were lawfully in possession of a piece of land under water upon which they had planted a bed of oysters. They held their title under legislative authority, which was as ample and unquestioned as that under which defendant's sewer was constructed. Although this land was under public waters it was as much the private property of the plaintiffs as though it had been a tract of farm land held under a lease from the town of Flatlands under legislative authority. The act of the defendant in pouring its sewage upon this land was not consequential. It was as direct as though it had been discharged upon a piece of land owned or rented by the plaintiffs and used for farming or gardening purposes. In the latter case a municipal corporation could not successfully defend its trespass because it was acting under legislative authority; or because its sewage had been carried to the lands of the person complaining over the lands of others. The fact that plaintiffs' land was under public water, and that defendant's sewage was discharged upon it, after passing through three hundred feet of public water, the land under which was not in the possession or control of the plaintiffs, does not differentiate this case in principle from the illustrative case of a discharge of sewage upon surface lands. In either case the injury is so direct as to amount to an invasion of a private right, which no legislative sanction or direction can justify or

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excuse. These views are, we think, sustained by abundant authority. Early in the history of this court the distinction was clearly pointed out between direct and consequential injury to private lands in the prosecution of public work performed under legislative direction. The case of *Rudoliff's Executors v. Mayor, etc., of Brooklyn* (4 N. Y. 205) was one in which the plaintiffs were held not entitled to recover for injuries to their lands occasioned by a change of grade in the street adjoining the same. None of their lands had been taken or invaded. In speaking of the rule applicable to such cases, Judge BRONSON said: "Private property cannot be taken for public use without making just compensation to the owner; and a law which authorizes the taking without providing for compensation, must be unconstitutional and void. But laws which authorize the opening and improving of streets and highways, or the construction of other works of a public nature, have never been held void because they omitted to provide compensation for those who, *though their property was not taken*, suffered indirect or consequential damages." In *Bellinger v. New York Central Railroad* (23 N. Y. 47) the defendant, under legislative authority, constructed a railroad embankment in such a manner as to cause a stream to overflow the lands of the plaintiff. Judge DENIO, in discussing the right of the railroad company to do the act complained of, said: "This is, of course, to be understood as limited to cases in which the legislature has the constitutional power to act. If, therefore, a corporation or an officer should be authorized by a statute to take the property of individuals for any purpose, however public or generally beneficial, without compensation, or, for a private use, making compensation, the pretended authority would be wholly void, and, of course, could afford no protection to any one. *But this limitation has no application to cases where property is not taken, but only subjected to damages consequential upon some act done by the state or pursuant to its authority.*"

In *Atwater v. Trustees of the Village of Canandaigua* (124 N. Y. 602), cited by defendant, and arising out

of a state of facts similar to those in the *Bellinger Case* (*supra*) the distinction above adverted to was again recognized by this court in the following language: "In the present case the action of the defendants in the performance of the work was confined within the limits where they had the right to execute it, and the effect upon property beyond those bounds resulting in damages was the consequence of such performance of the work, and not the direct act of its execution by them. In that respect this case is distinguishable from that of *St. Peter v. Denison* (58 N. Y. 416). *There the defendant was held liable because, by casting stone upon the premises, he committed a trespass; and the fact that he was engaged in the performance of a public work and the fragment of rock was in the process of blasting thrown upon the land of another, was no justification.* Here the injury to the plaintiffs' premises was not done directly by any act of the defendants, but it was the consequence following and traceable to the work as the cause. *In the one case the act of the party was, and in the other not, a direct invasion of the premises of the plaintiff.*"

But even more directly in point are *Noonan v. City of Albany* (79 N. Y. 476) and *N. Y. C. & H. R. R. Co. v. City of Rochester* (127 N. Y. 591). In the first of these cases it was held: "A municipal corporation has no greater right than an individual to collect the surface water from its lands or streets into an artificial channel, and discharge it upon the lands of another, nor has it any immunity from legal responsibility for creating or maintaining nuisances." In the other case it was decided that "a municipality may not empty its sewers upon private property, without acquiring the right so to do." The same doctrine was held to apply in *Seifert v. City of Brooklyn* (101 N. Y. 143), which was an action brought to recover damages alleged to have been caused to plaintiff's premises by defendant's negligence in the construction of a sewer. There Chief Judge RUGER stated the rule, which is applicable here, as follows: "It is a principle of the fundamental law of the state that the property of individuals

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cannot be taken for public use except upon the condition that just compensation be made therefor, *and any statute conferring power upon a municipal body, the exercise of which results in the appropriation, destruction or physical injury of private property by such body, is inoperative and ineffectual to protect it from liability for the resultant damages, unless some adequate provision is contained in the statute, for making such compensation.* * * * *Where * * * the acts done are of such a nature as to constitute a positive invasion of the individual rights guaranteed by the Constitution, legislative sanction is ineffectual as a protection to the persons or corporation performing such acts from responsibility for their consequences."*

The foregoing authorities sufficiently illustrate the underlying principle which must control the decision of this case. Briefly recapitulated, it is that when in the exercise of authority conferred upon them by the legislature, municipal corporations perform acts as a result of which some indirect or consequential injury is sustained by an individual, the latter has no right of action for such injury. Such injuries are *damnum absque injuria*. *But when a municipal corporation takes the property of an individual it must pay for it.*

We have not lost sight of defendant's contention that the deposit of sewage on the plaintiffs' land was not a taking of their property. We are of the opinion that any direct invasion of a man's land is a taking of his property within the meaning of the Constitution. The destruction of plaintiffs' oysters by the casting of sewage upon them was as clearly a taking of their property as the physical removal and conversion of the same would have been.

The judgment of the court below should be affirmed, with costs.

PARKER, Ch. J., GRAY, BARTLETT, MARTIN and VANN, JJ., concur; CULLEN, J., not sitting.

Judgment affirmed.



MEMORANDA

OF

*DECISIONS RENDERED DURING THE PERIOD EMBRACED IN
THIS VOLUME.*

In the Matter of the Application of **FREDERIC HALL WHITE**,
an Infant, for the Appointment of a General Guardian.

METCALF B. HATCH et al., Appellants; **THE LONG ISLAND
LOAN AND TRUST COMPANY**, Respondent.

(Submitted February 18, 1900; decided February 27, 1900.)

Motion for reargument denied, with ten dollars costs. (See
160 N. Y. 685.)

FERDINAND BOHMER, JR., Appellant, *v.* **LOUIS F. HAFFEN**,
Commissioner of Street Improvements of the Twenty-third
and Twenty-fourth Wards of the City of New York, **THE
MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW
YORK** and **THE UNION RAILWAY COMPANY OF THE CITY OF
NEW YORK**, Respondents.

(Submitted January 29, 1900; decided February 27, 1900.)

Motion for reargument denied, with ten dollars costs. (See
161 N. Y. 390.)

EDWARD H. MYERS et al., Respondents, *v.* **CLINTON P. PAINE
et al.**, Appellants.

Myers v. Paine, 13 App. Div. 332, affirmed.

(Argued February 2, 1900; decided February 27, 1900.)

APPEAL from a judgment of the Appellate Division of the
Supreme Court in the first judicial department, entered Janu-
ary 30, 1897, affirming a judgment in favor of plaintiffs, entered
upon the report of a referee.

Eugene D. Hawkins for appellants.

A. J. Simpson and *Benjamin N. Cardozo* for respondents.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN,
CULLEN and WERNER, JJ.

CHARLES B. GREY, Respondent, *v.* EUGENE WEST et al.,
Appellants.

Grey v. West, 12 App. Div. 625, affirmed.

(Submitted February 2, 1900; decided February 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 4, 1897, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

Homer Weston for appellants.

Adam J. Smith for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN,
CULLEN and WERNER, JJ.

THE SEWER COMMISSIONERS OF AMSTERDAM, Appellants, *v.*
TIMOTHY SULLIVAN et al., Respondents.

Sewer Commissioners v. Sullivan, 11 App. Div. 472, affirmed.

(Argued February 2, 1900; decided February 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered December 22, 1896, modifying and affirming as modified a judgment in favor of defendants entered upon the report of a referee.

W. Barlow Dunlap for appellants.

M. E. Driscoll for respondents.

Judgment affirmed, with costs, on opinion below.

CONCUR: GRAY, BARTLETT, VANN, CULLEN and WERNER, JJ.
Not voting: PARKER, Ch. J., and MARTIN, J.

ANTONINA KAZMIERCZAK, as President of the SISTERS' SOCIETY OF THE HOLY ROSARY, Respondent, *v.* ST. ADELBERT'S ROMAN CATHOLIC CHURCH SOCIETY OF BUFFALO, N. Y., Appellant.

Kazmierczak v. St. Adelbert's R. C. Church Socy., 14 App. Div. 628, affirmed.

(Argued February 2, 1900; decided February 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered February 13, 1897, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court, and an order denying a motion for a new trial.

Philip A. Laing for appellant.

E. G. Mansfield for respondent.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, BARTLETT, VANN, CULLEN and WERNER, JJ.

Not voting: PARKER, Ch. J., and MARTIN, J.

JOHN N. RENNINGER, Appellant, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Respondent.

Renninger v. N. Y. C. & H. R. R. Co., 11 App. Div. 565, affirmed.
(Argued February 5, 1900; decided February 27, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 29, 1897, reversing a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial, and granting a new trial.

Calvin S. Crosser for appellant.

Charles A. Pooley for respondent.

Order affirmed and judgment absolute ordered for defendant on the stipulation, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, HAIGHT, LANDON, CULLEN and WERNER, JJ. Not sitting: GRAY, J.

EGGAR J. HALL, Respondent, *v.* THE PRESIDENT, MANAGERS AND COMPANY OF THE DELAWARE AND HUDSON CANAL COMPANY, Appellant.

Hall v. President, etc., D. & H. C. Co., 22 App. Div. 680, affirmed.
(Argued February 5, 1900; decided February 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered December 1, 1897, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

Lewis E. Carr for appellant.

G. B. Wellington for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, CULLEN and WERNER, JJ. Not sitting: LONDON, J.

OLIVER M. ARKENBURGH, Individually and as Executor of the Last Will and Testament of ROBERT H. ARKENBURGH, Deceased, Appellant, *v.* JAMES WIGGINS, Trustee, et al., Impleaded with Others, Respondents.

Arkenburgh v. Wiggins, 13 App. Div. 96, affirmed.
(Submitted February 6, 1900; decided February 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered January 23, 1897, affirming a judgment sustaining demurrers to the complaint entered upon a decision of the court on trial at Special Term, and modifying and affirming as modified an order granting defendants an extra allowance.

Robert F. Little for appellant.

Charles Edward Souther for respondents.

Judgment and order affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, LONDON and WERNER, JJ. Not sitting, CULLEN, J.

WILLIAM ALYEA et al., Appellants, v. THE CITIZENS' SAVINGS BANK, Impleaded with Others, Respondents.

Alyea v. Citizens' Savings Bank, 12 App. Div. 574, affirmed.
(Argued February 6, 1900; decided February 27, 1900.)

APPEAL from a final judgment of the Supreme Court, entered January 15, 1897, upon an order of the Appellate Division of the Supreme Court in the first judicial department, affirming an interlocutory judgment sustaining a demurrer to the complaint, entered upon a decision of the court on trial at Special Term.

Hector M. Hitchings for appellants.

John Alex Beall for respondents.

Judgment affirmed, with costs, on opinion below.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, LANDON, CULLEN and WERNER, JJ.

ELLEN B. PARTRIDGE, Respondent, v. MILWAUKEE MECHANICS' INSURANCE COMPANY, Appellant.

Partridge v. Milwaukee M. Ins. Co., 18 App. Div. 519, affirmed.
(Argued February 6, 1900; decided February 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered February 4, 1897, affirming a judgment in favor of plaintiff entered upon the report of a referee.

Adelbert Moot for appellant.

William S. MacDonald for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, LANDON, CULLEN and WERNER, JJ.

KUNIGUNDA FANDEL, Respondent, v. THE THIRD AVENUE
RAILROAD COMPANY, Appellant.

Fandel v. Third Avenue R. R. Co., 15 App. Div. 426, affirmed.
(Argued February 6, 1900; decided February 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 29, 1897, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

Herbert R. Limburger, Henry L. Scheuerman and Henry Siegrist, Jr., for appellant.

Edmund Luis Mooney, Robert P. Harlow and M. P. O'Connor for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, LANDON, CULLEN and WERNER, JJ.

ALICE MCCARTHY, Respondent, v. EMERSON FEATHERSTON,
Individually, and as Surviving Administrator of MYRA
WHITE, Deceased, Appellant.

McCarthy v. Featherston, 15 App. Div. 625, affirmed.
(Argued February 7, 1900; decided February 27, 1900.)

APPEAL from a judgment and order of the Appellate Division of the Supreme Court in the third judicial department, entered March 5, 1897, affirming a judgment in favor of plaintiff entered upon the report of a referee.

A. W. Boynton for appellant.

S. E. Maders for respondent.

Judgment and order affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, CULLEN and WERNER, JJ. Not sitting, LANDON, J.

URANIA P. WELLING, Respondent, *v.* THE IVOROYD MANUFACTURING COMPANY, Appellant.

Welling v. Ivoroyd Manfg. Co., 15 App. Div. 116, affirmed.
(Argued February 7, 1900; decided February 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 24, 1897, affirming a judgment in favor of plaintiff entered upon the report of a referee.

J. K. Long for appellant.

P. Q. Eckerson for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, LANDON, and WERNER, JJ. Not sitting: CULLEN, J.

RACHEL A. MARTIN, Appellant, *v.* THE NEW ROCHELLE WATER COMPANY et al., Respondents.

Martin v. New Rochelle Water Co., 11 App. Div. 177, affirmed.
(Submitted February 7, 1900; decided February 27, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, made December 30, 1896, reversing a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term and granting a new trial.

John H. Clapp for appellant.

Frederick W. Whitridge and *Willard Parker Butler* for respondents.

Order affirmed, and judgment absolute ordered for defendants on the stipulation, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, LANDON and WERNER, JJ. Not sitting, CULLEN, J.

FREDERICK H. SMITH, JR., Respondent, *v.* HENRY J. CROOKER,
Appellant, Impleaded with Others.

Smith v. Crocker, 14 App. Div. 245, affirmed.

(Argued February 9, 1900; decided March 6, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 18, 1897, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

Charles K. Beekman and *Charles B. Alexander* for appellant.

Welton C. Percy for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, LANDON, CULLEN and WERNER, JJ.

CHARLES McCABE, Respondent, *v.* SARAH J. O'CONNOR et al.,
Appellants.

McCabe v. O'Connor, 4 App. Div. 354, affirmed.

(Submitted February 9, 1900; decided March 6, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered April 15, 1896, affirming a judgment in favor of plaintiff entered upon the report of a referee.

Henry J. McCormick for appellants.

Frank S. Black for respondent.

Judgment affirmed, with costs, on prevailing opinion below.

Concur: GRAY, O'BRIEN, HAIGHT, CULLEN and WERNER, JJ. Not voting: PARKER, Ch. J. Not sitting: LANDON, J.

JOHN MCKINNEY, Plaintiff and Appellant, *v.* JOHN J. WHITE et al., Defendants; HERBERT H. VREELAND et al., as Executors of GEORGE GREEN, Deceased, Impleaded with Others, Respondents.

McKinney v. White, 15 App. Div. 428, affirmed.
(Argued February 9, 1900; decided March 6, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 28, 1897, affirming a judgment in favor of defendants entered on the report of a referee.

D. M. Porter for appellant.

H. W. Simpson for respondents.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, HAIGHT, LANDON and WERNER, JJ. Dissent: O'BRIEN and CULLEN, JJ.

JOHN F. GUENTHER, Individually, and as Executor of HELEN GUENTHER, Deceased, Respondent, *v.* FRANK J. AMSDEN et al., Appellants.

Guenther v. Amaden, 16 App. Div. 607, affirmed.
(Argued February 13, 1900; decided March 6, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered April 19, 1897, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court, and an order denying a motion for a new trial.

H. H. Woodward for appellants.

Edwin M'Knight for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, LANDON, CULLEN and WERNER, JJ.

EDWARD WARNE, Respondent, *v.* CATHERINE STANTON,
Appellant.

Warne v. Stanton, 12 App. Div. 623, affirmed.
(Submitted February 13, 1900; decided March 6, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered February 3, 1897, modifying and, as modified, affirming a judgment in favor of plaintiff entered upon the report of a referee.

Richard Crowley for appellant.

Filkins & Coe for respondent.

Judgment affirmed, with costs ; no opinion.

CONCUR : PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, LANDON,
CULLEN and WERNER, JJ.

JAMES H. HENDRIE, Appellant, *v.* PETER KINNEAR,
Respondent.

Hendrie v. Kinnear, 15 App. Div. 625, affirmed.
(Submitted February 13, 1900; decided March 6, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered March 3, 1897, affirming a judgment in favor of defendant entered upon a decision of the Albany County Court on trial without a jury.

Edward J. Meegan for appellant.

Frederick E. Wadhams for respondent.

Judgment affirmed, with costs, on opinion in same case in 84 Hun, 141.

CONCUR : PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, CULLEN and WERNER, JJ. Not sitting : LANDON, J.

CHARLES HEIDENHEIMER et al., Respondents, v. ROBERT BOYD,
Appellant.

Heidenheimer v. Boyd, 15 App. Div. 580, affirmed.
(Submitted February 13, 1900; decided March 6, 1900.)

APPEAL from a judgment and order of the Appellate Division of the Supreme Court in the second judicial department, entered April 20, 1897, affirming a judgment in favor of plaintiffs entered upon a verdict, and an order denying a motion for a new trial.

Henry Daily, Jr., for appellant.

Samuel Untermeyer and *Moses Weinman* for respondents.

Judgment and order affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, LANDON, CULLEN and WERNER, JJ.

ROYAL PHELPS CARROLL, Respondent, v. THE NEW YORK
ELEVATED RAILROAD COMPANY and THE MANHATTAN RAIL-
WAY COMPANY, Appellants.

Carroll v. New York Elevated R. R. Co., 14 App. Div. 278, affirmed.
(Argued February 14, 1900; decided March 6, 1900.)

APPEAL from a judgment and order of the Appellate Division of the Supreme Court in the first judicial department, entered February 15, 1897, affirming a judgment in favor of plaintiff entered upon the report of a referee.

Sherrill Babcock and *Julien T. Davies* for appellants.

Egerton L. Winthrop, Jr., *Flamen B. Candler* and *John Jay Chapman* for respondent.

Judgment and order affirmed, with costs; no opinion.

CONCUR: GRAY, HAIGHT, CULLEN and WERNER, JJ. Dis-
sent: PARKER, Ch. J., O'BRIEN and LANDON, JJ.

MARIA GARDNER, Respondent, v. MARIA L. WINTERSON,
Appellant, Impleaded with Others.

Gardner v. Winterston, 17 App. Div. 630, affirmed.
(Argued February 14, 1900; decided March 6, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 14, 1897, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

E. G. Bullard for appellant.

Joseph N. Tuttle for respondent.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, O'BRIEN, HAIGHT, LANDON, CULLEN and WERNER, JJ. Not sitting, PARKER, Ch. J.

SOPHIA L. ROWE, Appellant, v. THE BROOKLYN LIFE INSURANCE COMPANY, Respondent.

Rowe v. Brooklyn Life Ins. Co., 11 App. Div. 532, affirmed.
(Argued February 14, 1900; decided March 6, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 30, 1896, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial without a jury, and granting a new trial.

Louis C. Rowe for appellant.

William H. Ford for respondent.

Order affirmed and judgment absolute ordered against plaintiff on the stipulation, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, LANDON, CULLEN and WERNER, JJ.

JAMES G. K. DUEB et al., Respondents, v. RICHARD R. HUNT, Appellant.

In the Matter of the Application for Discharge of a Certain Judgment against Defendant, Recovered in the Supreme Court, New York County, on or about March 22, 1879.

Reported below, 41 App. Div. 581.
(Argued February 26, 1900; decided March 6, 1900.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 23, 1899, reversing an order in favor of defendant entered upon a decision of the court on trial at Special Term.

The motion was made on the ground that the Court of Appeals has no jurisdiction to hear the appeal, and that the appeal was not taken within the time prescribed by the Code of Civil Procedure.

H. Reeves for motion.

J. Newton Fiero opposed.

Per Curiam. A motion under section 2182 of the Code of Civil Procedure to cancel a judgment is a special proceeding and not an order in an action.

The motion to dismiss the appeal is denied, with ten dollars costs.

ISAAC B. CANFIELD, Respondent, v. ANDREW X. FALLON et al., Executors of JULIA F. MANSFIELD, Deceased, et al., Respondents; CATHARINE E. GULBRANDSEN et al., Appellants.

(Argued February 26, 1900; decided March 6, 1900.)

MOTIONS to allow separate bills of costs to the several respondents. (See 161 N. Y. 623.)

Remittitur ordered amended so as to allow a bill of costs to the guardian *ad litem* of the infant defendants, Calantha, Arthur, Lloyd, Florence and Isaac Canfield; the other motions for separate costs are denied.

ISADORE NEUMAN, Respondent, *v.* THE NEW YORK MUTUAL
SAVINGS AND LOAN ASSOCIATION, Appellant.

Reported below, 17 App. Div. 72.

(Argued February 26, 1900; decided March 6, 1900.)

MOTION to open default taken by reason of the non-appearance of counsel of appellant upon the call of the case and to reinstate an appeal from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered April 16, 1897, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term, and granting a new trial.

Thomas F. Conway for motion.

T. Harvey Ferris opposed.

Motion to open default granted, on payment of ten dollars costs.

DANIEL MOONEY et al., Appellants, *v.* THE NEW YORK ELE-
VATED RAILROAD COMPANY et al., Respondents.

(Submitted February 26, 1900; decided March 6, 1900.)

MOTION to substitute James D. Mooney, as executor of Daniel Mooney, deceased, as appellant herein.

Johnston & Johnston for motion.

No one opposed.

Motion for order of substitution granted, without costs.

J. FRANK WRIGHT, Respondent, *v.* THE CITY OF MOUNT
VERNON, Appellant.

Reported below, 44 App. Div. 574.

(Argued February 26, 1900; decided March 6, 1900.)

MOTION to restore an appeal, dismissed for failure to file the return herein, from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 2, 1899, reversing a judgment in favor of defend-

ant entered upon the report of a referee, and granting a new trial.

William J. Marshall for motion.

Milo J. White opposed.

Motion to restore appeal granted, without costs to either party.

MAGNOLIA METAL COMPANY, Respondent, *v.* STERLINGWORTH
RAILWAY SUPPLY COMPANY et al., Appellants.

Magnolia Metal Co. v. Sterlingworth Ry. S. Co., 33 App. Div. 633, appeal dismissed.

(Submitted February 26, 1900; decided March 6, 1900.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered upon an order made at the August term, 1898, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

The motion was made on the grounds that the judgment of the Appellate Division was unanimous, and that the said Appellate Division has not allowed this appeal nor certified that questions of law have arisen which ought to be reviewed by the Court of Appeals.

Nichols & Bacon for motion.

Alex. Thain opposed.

Motion to dismiss appeal granted and appeal dismissed, with costs.

PATRICK TREACY, Plaintiff, *v.* ANTHONY ELLIS et al.,
Defendants.

RAPHAEL J. MOSES, Appellant; CHARLES E. SCHAFFNER,
et al., Respondents.

Treacy v. Ellis, 45 App. Div. 492, appeal dismissed.

(Argued February 26, 1900; decided March 6, 1900.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the first judicial depart-

ment, entered December 13, 1899, affirming an order granting the application of the respondents herein for the distribution of certain funds in the hands of the chamberlain of the city of New York, and denying the application of appellant to set aside the transfer to respondent Schaffner by the receiver of the Grand Central Bank, and to distribute said fund to the stockholders of said bank.

The motion was made on the grounds that the appeal cannot be taken as of right to the Court of Appeals, the order appealed from not being one finally determining an action or special proceeding, nor one granting a new trial on exceptions, nor has the Appellate Division allowed said appeal nor certified that questions of law have arisen which should be reviewed by this court.

William J. Leitch for motion.

Henry B. Heylman opposed.

Motion to dismiss appeal granted and appeal dismissed, with costs.

MANTON B. METCALF et al., Appellants and Respondents, v. MORRIS MOSES and JAMES T. FRANKLIN, as Receivers of the Property of LESSER BROS., Respondents and Appellants, Impleaded with TOBIAS LESSER et al., Appellants.

(Submitted February 26, 1900; decided March 6, 1900.)

Motion for reargument denied, with ten dollars costs. (See 161 N. Y. 587.)

JOHN COSTELLO, an Infant, by JOHN COSTELLO, his Guardian ad Litem, Appellant, v. THIRD AVENUE RAILROAD COMPANY, Respondent.

(Submitted February 26, 1900; decided March 6, 1900.)

Motion for reargument denied, with ten dollars costs. (See 161 N. Y. 317.)

**MINNIE B. LANDON, Respondent, v. THE PREFERRED ACCIDENT
INSURANCE COMPANY OF NEW YORK, Appellant.**

Reported below, 43 App. Div. 487.

(Argued February 26, 1900; decided March 6, 1900.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 3, 1899, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

The motion was made upon the grounds that this court is without jurisdiction to hear the appeal, that the judgment of the Appellate Division was unanimous, and, therefore, not appealable to this court, and that the exceptions taken are frivolous.

William S. Lewis for motion.

George E. Cooney, opposed.

Motion to dismiss appeal denied, with ten dollars costs.

**WYCKOFF VAN SICKLEN et al., Respondents, v. THE JAMAICA
ELECTRIC LIGHT COMPANY, Appellant.**

Reported below, 45 App. Div. 1.

(Submitted March 5, 1900; decided March 18, 1900.)

MOTION to dismiss an appeal from an order and judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 2, 1899, affirming a judgment in favor of plaintiffs, and an order denying a motion for a new trial.

The motion was made on the grounds that the decision of the Appellate Division was unanimous, that no questions of law are raised by the exceptions which can be reviewed by this court, and that such exceptions are frivolous.

James C. Van Sicklen for motion.

Monfort & Faber opposed.

Motion to dismiss appeal denied, with ten dollars costs.

PHILIP LIPP, as Administrator of GEORGE LIPP, Deceased, Respondent, *v.* OTIS BROTHERS AND COMPANY, Appellant, Impleaded with CHARLES J. GILLIS and STEPHEN J. GREGG and BENJAMIN ALTMAN, Respondents.

(Submitted March 5, 1900; decided March 18, 1900.)

Motion for reargument denied, with ten dollars costs. (See 161 N. Y. 559.)

MORRIS STEINHARDT, Appellant, *v.* JOHN O. BAKER, Respondent.

(Submitted March 5, 1900; decided March 18, 1900.)

MOTION to substitute Dauphine Steinhardt, Dudley S. Harde and Edna R. Steinhardt, as executors of Morris Steinhardt, deceased, as appellants herein.

Charles E. Miller for motion.

No one opposed.

Motion for substitution granted, without costs.

DE WITT A. HAYES, Respondent, *v.* SIMEON S. GROSS, Appellant.

Hayes v. Gross, 9 App. Div. 12, affirmed.

(Argued February 15, 1900; decided March 18, 1900.)

APPEAL from a judgment and order of the Appellate Division of the Supreme Court in the third judicial department, entered respectively October 9, 1896 and September 29, 1896, modifying, and affirming as modified a judgment in favor of plaintiff, entered upon the report of a referee.

Edgar A. Spencer for appellant.

A. D. L. Baker for respondent.

Judgment and order affirmed, with costs, on opinion below.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, CULLEN and WERNER, JJ. Not sitting, LANDON, J.

In the Matter of Proving the Last Will and Testament of
ABIGAIL JOURNEY, Deceased.

MARY L. ENGELBROOHT, Appellant; EDWARD SPRAGUE, as
Executor, et al., Respondents.

Matter of Journey, 15 App. Div. 567, affirmed.

(Argued February 26, 1900; decided March 18, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, made April 6, 1897, affirming a decree of the Surrogate's Court of Richmond county admitting to probate the last will and testament and the codicils thereto of Abigail Journey, deceased.

Calvin D. Van Name and *Mortimer S. Brown* for appellant.

George J. Greenfield for respondents.

Order affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT,
MARTIN, VANN and LANDON, JJ.

In the Matter of the Final Judicial Settlement of the Account
of EDWARD SPRAGUE, as Administrator of DAVID H.
JOURNEY, Deceased.

MARY L. ENGELBROOHT, Appellant; EDWARD SPRAGUE, as
Administrator, et al., Respondents.

Matter of Sprague, 40 App. Div. 615, affirmed.

(Argued February 26, 1900; decided March 18, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, made May 8, 1899, affirming a decree of the Surrogate's Court of Richmond county settling the accounts of Edward Sprague, as surviving administrator of the estate of David H. Journey, deceased.

Calvin D. Van Name and *Mortimer S. Brown* for appellant.

George J. Greenfield for respondents.

Order affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT,
MARTIN, VANN and LANDON, JJ.

WILLIAM J. MORGAN, Comptroller of the State of New York, and NICHOLAS GRUMBACH, County Treasurer of Onondaga County, Appellants, v. GEORGE B. WARNER et al., as Executors of JOHN STOLP, Deceased, et al., Respondents.

Morgan v. Warner, 45 App. Div. 424, affirmed.

(Submitted February 27, 1900; decided March 13, 1900.)

APPEAL from a judgment and order of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 3, 1899, affirming an order of the Surrogate's Court of Onondaga county modifying a prior order assessing a transfer tax upon certain property passing under the will of John Stolp, deceased.

John McLennan for appellants.

George B. Warner for respondents.

Judgment and order affirmed, with costs, on opinion below.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ.

In the Matter of the Petition of JOHN D. CAMPBELL, Respondent, for an Order Revoking and Canceling Liquor Tax Certificate No. 24,279, Issued to WILLIAM F. ROBINETT, Appellant.

DANIEL O'GRADY, Special Deputy Commissioner of Excise, Respondent.

Matter of Campbell, 46 App. Div. 634, affirmed.

(Argued February 27, 1900; decided March 13, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 2, 1900, reversing an order of Special Term dismissing an application for the revocation of a liquor tax certificate, and granting such application.

Moses Shire for appellant.

P. W. Cullinan and *L. H. Jones* for respondents.

Order affirmed, with costs, on opinion below.

Concur: PARKER, Ch. J., BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ. Not voting, O'BRIEN, J.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JOHN KOCH, Respondent, v. BENJAMIN B. ODELL, Mayor and ex officio Chief of Police of the City of Newburgh, Appellant.

People ex rel. Koch v. Odell, 44 App. Div. 630, affirmed.

(Submitted February 27, 1900; decided March 13, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered October 28, 1899, affirming an order of Special Term granting a peremptory writ of mandamus commanding the reinstatement of the relator in his position as police constable of the city of Newburgh.

C. L. Waring for appellant.

A. H. F. Seeger for respondent.

Order affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LONDON, JJ.

In the Matter of the Application of MICHAEL COOGAN, Respondent, for a Writ of Mandamus, v. WILLIAM J. MORGAN, as Comptroller of the State of New York, Appellant.

People ex rel. Coogan v. Morgan, 45 App. Div. 628, affirmed.

(Submitted February 27, 1900; decided March 13, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered November 15, 1899, affirming an order of Special Term granting a peremptory writ of mandamus commanding the appellant herein, as comptroller of the state of New York, to direct the county treasurer of Livingston county to refund to the petitioner certain moneys erroneously paid by him under the Transfer Tax Act.

Robert B. Bach for appellant.

Buchanan & Lawyer for respondent.

Order affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN and VANN, JJ. Not sitting, LONDON, J.

VIRGILIO DEL GENOVESI et al., Respondents, v. THE THIRD AVENUE RAILROAD COMPANY, Appellant.

Del Genovese v. Third Avenue R. R. Co., 18 App. Div. 412, affirmed.
(Argued February 1, 1900; decided March 20, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 27, 1897, affirming a judgment in favor of plaintiffs entered upon the report of a referee.

Henry L. Scheuerman and *Henry M. Ward* for appellant.

L. Laflin Kellogg and *Alfred C. Petté* for respondents.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ.

MICHAEL TULLY, Respondent, v. NEW YORK AND TEXAS STEAMSHIP COMPANY, Appellant.

Tully v. N. Y. & Texas Steamship Co., 10 App. Div. 463, affirmed.
(Argued February 2, 1900; decided March 20, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered January 6, 1897, modifying and as modified affirming a judgment in favor of plaintiff entered upon a verdict, and affirming an order denying a motion for a new trial.

George S. Coleman, *Tallmadge W. Foster* and *Thomas B. Hewitt* for appellant.

Edwin R. Leavitt for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., MARTIN, VANN and WERNER, JJ.
Not voting: GRAY and BARTLETT, JJ. Not sitting: CULLEN, J.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. ISAAC L. SMITH et al., Appellants, v. JAMES E. ALLEN, Commissioner of Highways of the Town of West Turin, Respondent.

People ex rel. Smith v. Allen, 87 App. Div. 248, affirmed.
(Argued February 27, 1900; decided March 20, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 30, 1899, reversing an order of Special Term granting a peremptory writ of mandamus directing the defendant, as commissioner of highways of the town of West Turin, to obey an order of the Lewis County Court commanding him to open and lay out a certain proposed highway in said town.

H. H. Ryel for appellants.

Henry W. Bentley for respondent.

Order affirmed, with costs, on opinion below.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ.

In the Matter of the Judicial Settlement of the Accounts of ANDREW B. YETTER, as Administrator of WILLIAM LIVINGSTON, Deceased.

ANDREW B. YETTER, as Administrator, Appellant; ANNIE LIVINGSTON CLEMENS, Contestant, et al., Respondents.

Matter of Yetter, 44 App. Div. 404, affirmed.
(Argued February 28, 1900; decided March 20, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, made November 24, 1899, modifying and as modified affirming a decree of the Surrogate's Court of the county of New York, settling the accounts of Andrew B. Yetter, as administrator of William Livingston, deceased.

Frederick E. Anderson for appellant.

Robert Weil for respondents.

Order affirmed, with one bill of costs in this court, payable out of the estate, on opinion below.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ.

IDA ALICE JAUNCEY et al., Respondents, v. HERMAN G. WEIBEAHL, Appellant, Impleaded with JOHN BARD et al., Respondents.

Jauncey v. Bard, 45 App. Div. 624, appeal dismissed.
(Argued February 28, 1900; decided March 20, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, made November 21, 1899, affirming an order of Special Term overruling the exceptions of the appellant herein to the report of a referee in an action to foreclose a mortgage, and confirming such report.

David B. Hill for appellant.

Charles L. Jones and *Joseph Kling* for respondents.

Appeal dismissed, with costs; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ.

ALFRED H. LORTON et al., Appellants, v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

Lorton v. The Mayor, 33 App. Div. 140, affirmed.
(Argued March 1, 1900; decided March 20, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered September 16, 1898, affirming a judgment in favor of defend-

ant entered upon a decision of the court on trial at Special Term.

Thomas Allison for appellants.

John Whalen, Corporation Counsel (*Theodore Connoly* of counsel), for respondent.

Judgment affirmed, with costs, on opinion below.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ.

JAMES V. LAWRENCE, as Surviving Partner of the Firm of LAWRENCE BROTHERS, Appellant, *v.* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

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Lawrence v. The Mayor, 29 App. Div. 298, affirmed.
(Submitted March 1, 1900; decided March 20, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 27, 1898, affirming a judgment entered upon a dismissal of the complaint, except as to the amount admitted by the defendant to be due, by the court at a Trial Term.

Joseph F. Daly for appellant.

John Whalen, Corporation Counsel (*Theodore Connoly*, of counsel), for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ.

MAGGIE PIEHL, as Administratrix of JOHN PIEHL, JR., Deceased, Appellant, *v.* THE ALBANY RAILWAY, Respondent.

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Piehl v. Albany Railway, 30 App. Div. 166, affirmed.
(Argued March 2, 1900; decided March 20, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered June

17, 1898, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

Mark Cohn for appellant.

Lewis E. Carr for respondent.

Judgment affirmed, with costs, on opinion below.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN and VANN, JJ. Not sitting: LANDON, J.

AMELIA S. CALLANAN, Respondent, v. MARGARET C. CLEMENT, as Executrix of PHEBE STEENBERGH, Deceased, Appellant.

Callanan v. Clement, 32 App. Div. 681, affirmed.

(Argued March 2, 1900; decided March 20, 1900.)

APPEAL from a judgment and order of the Appellate Division of the Supreme Court in the third judicial department, entered July 16, 1898, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Edgar T. Brackett for appellant.

James W. Verbeck for respondent.

Judgment and order affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN and VANN, JJ. Not sitting: LANDON, J.

THE BRADLEY & CURRIER COMPANY, LIMITED, Respondent, v. MAURICE T. WARD et al., Appellants.

Bradley & Currier Co. v. Ward, 15 App. Div. 336, affirmed.

(Argued March 2, 1900; decided March 20, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 15, 1897, overruling exceptions ordered to be heard in the

first instance by the Appellate Division, and ordering judgment in favor of plaintiff upon a verdict directed by the court.

Henry K. Davis for appellants.

Austin E. Pressinger for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ. Not voting: O'BRIEN, J.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v.
THOMAS J. RAY, Respondent.

People v. Ray, 86 App. Div. 889, appeal dismissed.
(Argued March 14, 1900; decided March 20, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered March 27, 1899, reversing a judgment of the Orange County Court convicting the defendant of the crime of feloniously receiving stolen goods, and granting a new trial.

A. H. F. Seeger for appellant.

Benjamin McClung for respondent.

Appeal dismissed; no opinion.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN and WERNER, JJ. Not sitting: CULLEN, J.

GEORGE W. BERGEN et al., Appellants, v. JOHN M. HITCHINGS,
Respondent.

Bergen v. Hitchings, 23 App. Div. 895, appeal dismissed.
(Argued March 15, 1900; decided March 20, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, made November 30, 1897, reversing a judgment in favor of plaintiffs entered upon the report of a referee, and granting a new trial.

Horace Secor, Jr., for appellants.

Hector M. Hitchings for respondent.

Appeal dismissed, with costs; no opinion.

Concur : PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN,
CULLEN and WERNER, JJ.

THE BUFFALO LOAN, TRUST AND SAFE DEPOSIT COMPANY,
Respondent, v. THE MEDINA GAS AND ELECTRIC LIGHT
COMPANY and THE HOLLAND TRUST COMPANY, Appellants.

(Submitted March 19, 1900; decided March 20, 1900.)

Motion for reargument denied, with ten dollars costs. (See
162 N. Y. 67.)

EDWARD S. STOKES, as Receiver of THE HOFFMAN HOUSE,
Respondent, v. THE HOFFMAN HOUSE OF NEW YORK,
Appellant.

Reported below, 46 App. Div. 120.

(Submitted March 12, 1900; decided March 20, 1900.)

MOTION to put on calendar and prefer an appeal from a
judgment of the Appellate Division of the Supreme Court,
in the first judicial department, entered January 2, 1900,
affirming a judgment in favor of plaintiff entered upon the
report of a referee.

The motion was made upon the grounds that the pendency
of this action prevents the winding up of the affairs of the
receivership herein, and that it is of the highest importance
to all parties and the interests of justice require the speedy
determination of the appeal.

Carter, Hughes & Dwight for motion.

Turner, McClure & Rolston opposed.

Motion to put on calendar and prefer denied, with ten dol-
lars costs.

THE UNION BANK et al., Appellants, v. FREDERICK A. SHERWOOD, Respondent, Impleaded with Others.

(Argued February 7, 1900; decided March 27, 1900.)

APPEAL, by permission, from so much of a judgment of the Appellate Division of the Supreme Court in the fourth judicial department as affirms that part of a judgment dismissing the complaint as to the defendant Frederick A. Sherwood, entered upon a decision of the court on trial at an Equity Term.

John Van Voorhis for appellants.

William F. Cogswell and *M. H. McMath* for respondent.

Judgment affirmed, with costs, upon the opinion in *Commercial Bank and Menzo Van Voorhis v. Frederick A. Sherwood, Impleaded, etc.* (162 N. Y. 310).

Concur: PARKER, Ch. J., O'BRIEN, HAIGHT, LONDON, CULLEN and WERNER, JJ.

ELIZABETH LAIBLE, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant, Impleaded with Another.

Laible v. N. Y. C. & H. R. R. R. Co., 18 App. Div. 574, affirmed.
(Argued March 5, 1900; decided March 27, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered February 9, 1897, sustaining the plaintiff's exceptions, ordered to be heard in the first instance by the Appellate Division after a nonsuit at a Trial Term, and granting a new trial.

Albert H. Harris for appellant.

William S. Jenney for respondent.

Order affirmed and judgment absolute ordered for plaintiff on the stipulation, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LONDON, JJ.

THOUSAND ISLAND PARK ASSOCIATION, Respondent, *v.* HELEN
M. GRIDLEY, Appellant.

Thousand Island Park Assn. v. Gridley, 17 App. Div. 621, affirmed.
(Argued March 5, 1900; decided March 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered April 21, 1897, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Louis L. Waters for appellant.

Edwin Nottingham for respondent.

Judgment affirmed, with costs ; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT,
MARTIN, VANN and LANDON, JJ.

JAMES WHITE, Respondent, *v.* JAMES D. RANKIN, Appellant.
ELMIRA E. CHRISTIAN, as Executrix of HANS S. CHRISTIAN,
Deceased, Respondent.

White v. Rankin, 18 App. Div. 298, affirmed.
(Submitted March 6, 1900; decided March 27, 1900.)

APPEAL from a judgment and order of the Appellate Division of the Supreme Court in the second judicial department, entered respectively June 19 and June 18, 1897, affirming a judgment in favor of plaintiff entered upon the report of a referee.

George F. Alexander for appellant.

Hector M. Hitchings and *George V. Brower* for respondents.

Judgment and order affirmed, with costs ; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT,
MARTIN, VANN and LANDON, JJ.

ADOLPH KRAKAUER et al., Respondents, v. HENRY T. CHAPMAN, JR., Appellant.

Krakauer v. Chapman, 16 App. Div. 115, affirmed.
(Argued March 6, 1900; decided March 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 1, 1897, affirming a judgment in favor of plaintiffs entered upon a verdict directed by the court.

Charles C. Levenson and *Henry S. Bennett* for appellant.

George H. Fletcher for respondents.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ.

NATIONAL HUDSON RIVER BANK, Respondent, v. JOHN F. MOFFETT et al., Appellants, Impleaded with Another.

Nat. Hudson River Bank v. K. & H. R. Co., 17 App. Div. 232, affirmed.
(Argued March 6, 1900; decided March 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered June 1, 1897, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial without a jury.

Louis Marshall for appellants.

C. P. Collier for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: O'BRIEN, BARTLETT, HAIGHT, MARTIN and VANN, JJ. Not sitting: PARKER, Ch. J., and LANDON, J.

REUEL H. THAYER, Respondent, v. DWIGHT W. HODGE et al.,
Appellants.

Thayer v. Hodge, 13 App. Div. 627, affirmed.

(Argued March 8, 1900; decided March 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered February 3, 1897, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

Adelbert Moot for appellants.

Spencer Clinton for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT,
MARTIN, VANN and LANDON, JJ.

WILLIAM J. LOGAN et al., Appellants, v. MARSHALL T. DAVID-
SON, Respondent.

Logan v. Davidson, 18 App. Div. 853, affirmed.

(Argued March 8, 1900; decided March 27, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 22, 1897, reversing a judgment in favor of plaintiffs entered upon a verdict, and an order denying a motion for a new trial and granting a new trial.

Edward P. Lyon for appellants.

Alexander Cameron and *William B. Hill* for respondent.

Order affirmed and judgment absolute ordered for defendant on the stipulation, with costs; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT,
MARTIN, VANN and LANDON, JJ.

RICHARD COUSINS, Appellant, v. EDWARD J. SWORDS,
Respondent.

Cousins v. Swords, 14 App. Div. 338, affirmed.
(Submitted March 9, 1900; decided March 27, 1900.)

APPEAL from a final judgment of the Supreme Court, entered May 12, 1897, by default, after the failure of plaintiff to serve an amended complaint within twenty days as allowed by an order of the Appellate Division in the first judicial department, reversing an interlocutory judgment overruling a demurrer to the complaint and sustaining such demurrer.

W. B. Donihee for appellant.

William H. Sage for respondent.

Judgment and order affirmed, with costs, on opinion below.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT,
MARTIN, VANN and LANDON, JJ.

ANGELINE ODELL, Respondent, v. THE NEW YORK CENTRAL
AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Odell v. N. Y. C. & H. R. R. R. Co., 18 App. Div. 12, affirmed.
(Submitted March 9, 1900; decided March 27, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 4, 1897, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term, and granting a new trial.

Charles C. Paulding for appellant.

William H. H. Ely for respondent.

Order affirmed and judgment absolute ordered for plaintiff on the stipulation, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT,
MARTIN, VANN and LANDON, JJ.

THE BUFFALO DOCK COMPANY, Respondent, v. ADOLPH LADENBURG et al., Appellants.

Buffalo Dock Co. v. Ladenburg, 19 App. Div. 35, affirmed.
(Argued March 9, 1900; decided March 27, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 21, 1897, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Stevenson Burke and *Adelbert Moot* for appellants.

John G. Milburn for respondent.

Judgment affirmed, with costs, on opinion at Special Term.
CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ.

HENRIETTA F. MEAD, Respondent, v. WILLIAM H. MARTENS, Appellant.

Mead v. Martens, 21 App. Div. 134, affirmed.
(Submitted March 9, 1900; decided March 27, 1900.)

APPEAL from a judgment and order of the Appellate Division of the Supreme Court in the second judicial department, entered October 8, 1897, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Isaac N. Mills and *Arthur M. Johnson* for appellant.

J. Mortimer Bell for respondent.

Judgment and order affirmed, with costs; no opinion.
CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ.

GEORGE W. CRAM, Respondent, *v.* KENNETH CRANFORD,
Appellant.

Cram v. Cranford, 19 App. Div. 607, affirmed.
(Submitted March 9, 1900; decided March 27, 1900.)

APPEAL from a judgment and order of the Appellate Division of the Supreme Court in the second judicial department, entered, respectively, August 2 and July 9, 1897, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

Isaac N. Mills for appellant.

William L. Snyder for respondent.

Judgment and order affirmed, with costs, and ten per cent added under subdivision 5 of section 3251 of the Code of Civil Procedure; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ.

ALFRED STROME, Respondent, *v.* LONDON ASSURANCE CORPORATION, Appellant.

Strome v. London Assurance Corp., 20 App. Div. 571, affirmed.
(Submitted March 9, 1900; decided March 27, 1900.)

APPEAL from a judgment and order of the Appellate Division of the Supreme Court in the second judicial department, entered, respectively, October 11 and October 5, 1897, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Willard Parker Butler for appellant.

William M. Benedict for respondent.

Judgment and order affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, *v.*
STEPHEN L. MERSHON, Respondent.

People v. Mershon, 48 App. Div. 541, appeal dismissed.
(Argued March 12, 1900; decided March 27, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered October 23, 1899, reversing a judgment of the Orange County Court, convicting the defendant of the crime of forgery in the second degree.

A. H. F. Seeger for appellant.

Hector M. Hitchings for respondent.

Appeal dismissed; no opinion.

CONCUR: PARKER, Ch. J., GRAY, BAILETT, MARTIN, VANN and WERNER, JJ. Not sitting, CULLEN, J.

I. OSGOOD CARLETON et al., Respondents, *v.* LOMBARD, AYRES & Co., Appellant.

Carleton v. Lombard, Ayres & Co., 19 App. Div. 297, affirmed.
(Argued February 15, 1900; decided March 27, 1900.)

APPEAL from a judgment and order of the Appellate Division of the Supreme Court in the first judicial department, entered, respectively, July 1 and June 29, 1897, affirming a judgment in favor of plaintiffs, entered upon a verdict, and an order denying a motion for a new trial.

Albert B. Boardman and *Benjamin F. Tracy* for appellant.

R. Burnham Moffat for respondents.

Judgment and order affirmed, with costs, on opinion below.

GRAY, O'BRIEN, HAIGHT, LONDON and WERNER, JJ., concur; PARKER, Ch. J., not sitting; CULLEN, J., reads memorandum for reversal.

MEMORANDA.

CULLEN, J. (dissenting). This case has been in litigation so long and tried so often that I should be unwilling to reverse the judgment for any slight error that may have taken place on the trial. But in my judgment the ruling of the trial court excluding the offer of defendant to prove any damage occurring to the oil while on shipboard was erroneous, and its effect on the recovery may have been substantial. The judgment in the action of Graham & Company against the present plaintiffs was conclusive evidence in this action of the fact that the oil was unmerchantable when delivered by this defendant. It is entirely possible, however, that the oil, though unmerchantable, may have been damaged in transportation from extraneous causes. In the suit of Graham & Company against the plaintiffs, such loss would necessarily fall upon the plaintiffs in this action, for, on account of the oil being unmerchantable, the title thereto did not pass from the plaintiffs to Graham & Company; in other words, the loss would fall on the owner of the property. In that action the issue as to the damage that the oil received by its transportation was litigated and could have been litigated only to a limited extent; that is to say, it was material to determine whether the condition (concededly bad) in which the oil reached its destination was due solely to the damage received during the voyage, or whether the oil was originally unmerchantable. The judgment necessarily determined that transportation did not make good oil bad, but it did not determine that bad oil was not made worse. This action is on the defendant's warranty, and it is unquestioned that the title passed on the delivery by the defendant to the plaintiffs. The defendant is liable for all damages that accrued to the plaintiffs from the defective character of the article furnished; but I do not see how it can be held liable for damage or deterioration of the oil proceeding from other causes. Therefore, I feel constrained to vote for reversal of the judgment.

HENRY B. BLANCHARD et al., Executors of THEODORE A. BLANCHARD, Deceased, Respondents, v. SUSAN JEFFERSON, Appellant.

Blanchard v. Jefferson, 18 App. Div. 314, affirmed.
(Argued March 12, 1900; decided April 3, 1900.)

APPEAL from a judgment and order of the Appellate Division of the Supreme Court in the first judicial department, entered March 17, 1897, affirming a judgment in favor of plaintiffs entered upon the report of a referee.

John L. Hill for appellant.

Charles E. Hughes for respondents.

Judgment and order affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ.

JOHN JAMIESON et al., Respondents, v. THE NEW YORK AND ROCKAWAY BEACH RAILWAY COMPANY, Appellant.

Jamieson v. N. Y. & Rockaway Beach R. Co., 11 App. Div. 50, affirmed.
(Argued March 13, 1900; decided April 8, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered January 6, 1897, modifying and, as modified, affirming a judgment in favor of plaintiffs entered upon a verdict, and affirming an order denying a motion for a new trial.

William C. Beecher for appellant.

Henry A. Monfort for respondents.

Judgment affirmed, with costs, on opinion below.

Concur: PARKER, Ch. J., BARTLETT, MARTIN, VANN and WERNER, JJ. Not voting: GRAY, J. Not sitting: CULLEN, J.

EDWARD D. IRISH, Respondent, v. ELIZABETH G. HORN,
Appellant.

Irish v. Horn, 19 App. Div. 682, affirmed.
(Argued March 18, 1900; decided April 8, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered July 9, 1897, affirming a judgment in favor of plaintiff entered upon the report of a referee.

Charles M. Parsons for appellant.

T. W. McArthur for respondent.

Order affirmed and judgment absolute ordered for plaintiff on the stipulation, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ.

THE J. & A. McKECHNIE BREWING COMPANY, Respondent, v.
THE TRUSTEES OF THE VILLAGE OF CANANDAIGUA et al.,
Appellants.

McKechnie Brewing Co. v. Trustees, 15 App. Div. 139, affirmed.
(Argued March 14, 1900; decided April 8, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered March 22, 1897, reversing a judgment in favor of defendants entered upon the report of a referee, and granting a new trial.

John Colmey and *James C. Smith* for appellants.

Frank Rice and *Henry M. Field* for respondent.

Order affirmed and judgment absolute ordered for plaintiff on the stipulation on opinion of PUTNAM, J., below, with costs.

Concur: PARKER, Ch. J., GRAY, BARTLETT, CULLEN and WERNER, JJ. Not voting: MARTIN and VANN, JJ.

SAMUEL BURGESS, Respondent, *v.* HENRY H. JACKSON et al.,
Composing the Firm of PETER A. H. JACKSON'S SONS,
Appellants.

Burges v. Jackson, 18 App. Div. 296, affirmed.
(Argued March 14, 1900; decided April 3, 1900.)

APPEAL from a judgment and order of the Appellate Division of the Supreme Court in the second judicial department, entered, respectively, June 21 and June 15, 1897, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

Edward W. S. Johnston for appellants.

Charles A. Webber for respondent.

Judgment and order affirmed, with costs, on opinion below.

Concur: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN
and WERNER, JJ. Not sitting: CULLEN, J.

FREDERICK RANSCHT, Respondent, *v.* SARAH ANN WRIGHT,
Appellant.

Ranscht v. Wright, 9 App. Div. 108, affirmed.
(Argued March 14, 1900; decided April 3, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 17, 1896, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

William A. Woodworth and *Isaac N. Mills* for appellant.

Wilson Brown, Jr., for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN
and WERNER, JJ. Not sitting: CULLEN, J.

**WILCOX AND GIBBS SEWING MACHINE COMPANY, Appellant,
v. JEHIEL W. HIMES, Respondent.**

Willcox & Gibbs S. M. Co. v. Himes, 17 App. Div. 637, affirmed.
(Argued March 14, 1900; decided April 3, 1900.)

APPEAL from a judgment of the Supreme Court, entered June 25, 1897, upon an order of the Appellate Division in the first judicial department, made May 7, 1897, overruling plaintiff's exceptions, ordered to be heard in the first instance by the Appellate Division, denying a motion for a new trial and directing judgment for defendant upon the order of the Trial Term dismissing the complaint.

George W. Van Slyck for appellant.

Austen G. Fox for respondent.

Judgment and order affirmed, with costs; no opinion.

Concur: GRAY, BARTLETT, MARTIN, VANN, CULLEN and
WERNER, JJ. Not sitting: PARKER, Ch. J.

MARGARET MAHAR, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Maher v. N. Y. C. & H. R. R. Co., 20 App. Div. 161, affirmed.
(Argued March 15, 1900; decided April 3, 1900.)

APPEAL from a judgment and order of the Appellate Division of the Supreme Court in the fourth judicial department, entered August 9, 1897, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

Charles A. Pooley for appellant.

S. E. Filkins for respondent.

Judgment and order affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ. Not sitting: GRAY, J.

HENRY A. V. POST et al., Surviving Partners of the Firm of POST, MARTIN & Co., Respondents, v. CHARLES H. GREEN et al., Appellants.

Post v. Green, 10 App. Div. 816, affirmed.
(Submitted March 15, 1900; decided April 3, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 2, 1896, affirming a judgment in favor of plaintiffs entered upon a verdict, and an order denying a motion for a new trial.

Abraham Gruber for appellants.

Edward B. Hill for respondents.

Judgment affirmed, with costs, on opinion below.

Concur: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ.

WILLIAM GAMBLE, Respondent, v. NICHOLAS CUNEO, Appellant, Impleaded with Another.

Gamble v. Cuneo, 21 App. Div. 413, affirmed.
(Argued March 16, 1900; decided April 3, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 8, 1897, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term, and granting a new trial.

Frederick H. Man and *Henry H. Man* for appellant.

Franklin Pierce for respondent.

Order affirmed and judgment absolute ordered for plaintiff on the stipulation for \$5,415.50, with interest from April 6, 1897, with costs in all courts; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ.

MARY J. DODIN, Plaintiff, *v.* ALEXANDER J. DODIN, Appellant,
and JOSEPHINE DODIN, Respondent.

Dodin v. Dodin, 16 App. Div. 42, affirmed.
(Argued March 16, 1900; decided April 8, 1900.)

APPEAL from a final judgment of the Supreme Court, entered in the first judicial department after the entry of an order of the Appellate Division in the second department, made April 13, 1897, affirming an interlocutory judgment determining that the defendants were the only heirs at law of Mansuy P. Dodin, deceased, and as such are seized in fee in equal shares as tenants in common of the real property described in the complaint, subject to the plaintiff's right of dower therein, entered upon a decision of the court on trial at Special Term.

George H. Yeaman and *J. P. Albright* for appellant.

William F. Clare for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, MARTIN and WERNER, JJ.

Dissent: BARTLETT and VANN, JJ. Not sitting: CULLEN, J.

GEORGE S. CONANT, Appellant, *v.* GEORGE A. WRIGHT and
EUGENE F. SEYMOUR et al., Executors of GEORGE DE V.
SEYMOUR, Deceased, Respondents.

Conant v. Wright, 22 App. Div. 216, affirmed,
(Argued March 16, 1900; decided April 6, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered November 26, 1897, affirming a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

Eustace Conway and *Charles R. Westbrook* for appellant.

R. E. Waterman and *Eugene F. Seymour* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN,
CULLEN and WERNER, JJ.

WILLIAM H. BALDWIN, JR., et al., Appellants, v. PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK, Respondent.

Baldwin v. Provident Life Assurance Soc., 23 App. Div. 5, affirmed.
(Argued March 19, 1900; decided April 6, 1900.)

APPEAL from a judgment and order of the Appellate Division of the Supreme Court in the second judicial department, entered in favor of defendant December 21, 1897, upon the submission of a controversy on an agreed statement of facts under section 1279 of the Code of Civil Procedure.

Charles A. Boston for appellants.

William T. Gilbert for respondent.

Judgment and order affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, MARTIN and WERNER, JJ. Not voting: VANN, J. Not sitting: CULLEN, J.

MARY E. GUGEL, Respondent, v. BERNARD ISAACS, Appellant.

Gugel v. Isaacs, 21 App. Div. 508, affirmed.
(Argued March 19, 1900; decided April 6, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered in favor of plaintiff November 15, 1897, upon the submission of a controversy on an agreed statement of facts under section 1279 of the Code of Civil Procedure.

A. J. Skinner for appellant.

Robert McM. Gillespie and *Stanley W. Dexter* for respondent.

Judgment affirmed, with costs, on opinion below.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, CULLEN and WERNER, JJ. Not voting: VANN, J.

FREDERICK W. COLE, Appellant, v. GEORGE A. STEARNS,
Respondent.

Cole v. Stearns, 28 App. Div. 446, affirmed.
(Argued March 19, 1900; decided April 6, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 27, 1897, affirming a judgment in favor of defendant entered upon a decision of the court at a Trial Term without a jury.

Eustace Conway and *Charles R. Westbrook* for appellant.

Guy C. Frisbie and *Oscar Frisbie* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN,
CULLEN and WERNER, JJ.

MARY A. KNOPE, Respondent, v. JOSEPH NUNN, Appellant.

(Argued March 20, 1900; decided April 6, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered September 8, 1897, affirming a judgment in favor of plaintiff entered upon the report of a referee.

John H. Hopkins for appellant.

John A. Bernhard for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN,
CULLEN and WERNER, JJ.

THE TRUSTEES OF EMANUEL CHURCH, Respondent, v. THE
BRITISH AMERICA ASSURANCE COMPANY, Appellant.

Trustees of Emanuel Church v. British America Assur. Co., 20 App. Div.
636, affirmed.

(Argued March 20, 1900; decided April 6, 1900.)

APPEAL from a judgment and order of the Appellate Division of the Supreme Court in the third judicial department, entered September 27, 1897, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

A. T. Clearwater for appellant.

Howard Chipp for respondent.

Judgment and order affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN,
CULLEN and WERNER, JJ.

JOSEPH MADDEN, an Infant, by MARGARET TALBUT, his Guardian ad Litem, Respondent, v. ISAAC ARNOLD, Appellant.

(Submitted March 21, 1900; decided April 6, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered September 21, 1898, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

E. Countryman for appellant.

P. C. Dugan for respondent.

Judgment affirmed, with costs, on opinion below.

Concur: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN,
CULLEN and WERNER, JJ.

GEORGE BLASS, Respondent, *v.* AGRICULTURAL INSURANCE COMPANY OF WATERTOWN, N. Y., Appellant.

Blass v. Agricultural Ins. Co., 18 App. Div. 481, affirmed.
(Argued March 22, 1900; decided April 6, 1900.)

APPEAL from a judgment of the Supreme Court, entered July 3, 1897, upon an order of the Appellate Division in the fourth judicial department, made June 12, 1897, overruling defendant's exceptions ordered to be heard in the first instance by the Appellate Division, and directing judgment upon a verdict in favor of plaintiff.

A. H. Sawyer for appellant.

James W. Hart for respondent.

Judgment and order affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ.

SOPHIA L. ROWE, Appellant, *v.* THE BROOKLYN LIFE INSURANCE COMPANY, Respondent.

(Submitted April 2, 1900; decided April 6, 1900.)

Motion for reargument denied, with ten dollars costs. (See 162 N. Y. 604.)

RUTH A. JOHNSTONE, Appellant, *v.* EUGENE F. O'CONNOR, Respondent.

Johnstone v. O'Connor, 21 App. Div. 77, affirmed.
(Argued March 1, 1900; decided April 17, 1900.)

APPEAL from a judgment and order of the Appellate Division of the Supreme Court in the second judicial department,

entered December 17, 1897, affirming a judgment in favor of defendant entered upon the report of a referee.

John L. Hill and *William D. Veeder* for appellant.

Edward C. Boardman for respondent.

Judgment and order affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ.

**WILLIAM MURRAY, Appellant, v. MAY CHARMAN, Respondent,
Impleaded with Others.**

Murray v. Charman, 28 App. Div. 626, affirmed.
(Argued March 26, 1900; decided April 17, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered January 18, 1898, affirming a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

Henry T. Dykeman for appellant.

Everett P. Wheeler for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, LANDON and WERNER, JJ. Not sitting: CULLEN, J.

**ELLEN J. COXHEAD, Respondent, v. ALBERT L. JOHNSON et
al., Appellants.**

Coxhead v. Johnson, 20 App. Div. 605, affirmed.
(Argued March 28, 1900; decided April 17, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered

October 19, 1897, modifying and affirming, as modified, a judgment in favor of plaintiff entered upon a verdict.

Yonge, Brewster & Shearn for appellants.

Thomas E. Pearsall for respondent.

Judgment affirmed, with costs ; no opinion.

Concur : PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, LANDON and WERNER, JJ. Not sitting : CULLEN, J.

MEYER SHAIER, Respondent, *v.* THE BROADWAY IMPROVEMENT COMPANY, Appellant.

Shaier v. Broadway Improvement Co., 22 App. Div. 102, affirmed.
(Argued March 28, 1900; decided April 17, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 23, 1897, affirming a judgment in favor of plaintiff entered upon a verdict.

Charles C. Nadal for appellant.

Francis L. Wellman and *Sumner B. Stiles* for respondent.

Judgment affirmed, with costs ; no opinion.

Concur : PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, LANDON, CULLEN and WERNER, JJ.

LEE B. WEBB, a Taxpayer of the Town of Orange, Respondent, *v.* ROBERT BELL et al., Appellants, Impleaded with Others.

Webb v. Bell, 22 App. Div. 314, affirmed.
(Argued March 28, 1900; decided April 17, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered

November 29, 1897, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

O. P. Hurd for appellants.

Owen Cassidy and *Charles M. Woodward* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, CULLEN, and WERNER, JJ. Not sitting: LANDON, J.

THE LACKAWANNA MILLS, Respondent, *v.* SAMUEL WEIL et al., Composing the firm of WEIL, HASKELL AND COMPANY, Appellants.

Lackawanna Mills v. Weil, 21 App. Div. 492, affirmed.
(Argued March 28, 1900; decided April 17, 1900.)

APPEAL from a judgment and order of the Appellate Division of the Supreme Court in the first judicial department, entered, respectively, October 30 and October 29, 1897, modifying and affirming, as modified, a judgment in favor of plaintiff entered upon a verdict, and affirming an order denying a motion for a new trial.

B. F. Einstein for appellants.

A. A. Spear for respondent.

Judgment and order affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, LANDON, CULLEN and WERNER, JJ.

WILLIAM BROADBELT, Respondent, *v.* SARAH L. LOEW, Appellant.

Broadbelt v. Loew, 15 App. Div. 343, affirmed.
(Argued March 30, 1900; decided April 17, 1900.)

APPEAL from a judgment and order of the Appellate Division of the Supreme Court in the first judicial depart-

ment, entered, respectively, April 19 and March 5, 1897, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court at Special Term and directing judgment for the plaintiff.

David McClure for appellant.

John Frankenheimer for respondent.

Judgment and order affirmed, with costs, on opinion below,
Concur: GRAY, O'BRIEN, HAIGHT, LONDON, CULLEN and
WERNER, JJ. Not sitting: PARKER, Ch. J.

EDWARD G. SMITH, Respondent, *v.* ROBERT J. GRAY,
Appellant.

Smith v. Gray, 19 App. Div. 262, affirmed.
(Argued April 2, 1900; decided April 17, 1900.)

APPEAL from a judgment and order of the Appellate Division of the Supreme Court in the first judicial department, entered, respectively, July 22 and July 10, 1897, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

Edmund Luis Mooney for appellant.

George W. Dease for respondent.

Judgment and order affirmed, with costs; no opinion.

Concur: GRAY, HAIGHT, LONDON and WERNER, JJ. Not sitting: PARKER, Ch. J. Not voting: O'BRIEN and CULLEN, JJ.

GEORGE FRUH, Respondent, *v.* WALTER F. DUCKWORTH et al.,
Appellants.

Fruh v. Duckworth, 23 App. Div. 624, affirmed.
(Argued April 2, 1900; decided April 17, 1900.)

APPEAL from a judgment and order of the Appellate Division of the Supreme Court in the second judicial department,

entered December 14, 1897, affirming a judgment in favor of plaintiff entered upon a verdict.

Maurice S. Hyman for appellants.

Reuben H. Underhill and *George L. Robinson* for respondent.

Judgment and order affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, LANDON and WERNER, JJ. Not sitting: CULLEN, J.

THOMAS FAY, Respondent, *v.* JOHN C. MCGUIRE et al., Composing the Firm of MCGUIRE & Low, Appellants.

Fay v. McGuire, 20 App. Div. 569, affirmed.

(Argued April 2, 1900; decided April 17, 1900.)

APPEAL from a judgment and order of the Appellate Division of the Supreme Court in the second judicial department, entered respectively, October 13 and October 5, 1897, in favor of plaintiff, upon the submission of a controversy on an agreed statement of facts, under section 1279 of the Code of Civil Procedure.

John C. McGuire for appellants.

Jacob H. Shaffer and *Béla D. Eisler* for respondent.

Judgment and order affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, LANDON and WERNER, JJ. Not sitting: CULLEN, J.

MELVIN E. SHAW, Respondent, *v.* THE NIAGARA WHITE GRAPE COMPANY, Appellant.

Shaw v. Niagara White Grape Co., 24 App. Div. 633, affirmed.

(Argued April 3, 1900; decided April 17, 1900.)

APPEAL from a judgment and order of the Appellate Division of the Supreme Court in the fourth judicial depart-

ment, entered December 29, 1897, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

David Millar for appellant.

Thomas A. Kirby for respondent.

Judgment and order affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, LANDON, CULLEN and WERNER, JJ.

MARGARET KLEINER, by her Guardian ad Litem, CHARLES KLEINER, Respondent, v. THE THIRD AVENUE RAILROAD COMPANY, Appellant.

(Submitted March 26, 1900; decided April 17, 1900.)

Motion for reargument denied, with ten dollars costs. (See 162 N. Y. 193.)

VIRGINIA K. HASCALL, Appellant, v. VINCENT C. KING, JR., and ANNA LOUISA KING, Individually and as Executor and Executrix of and Trustees under the Will of VINCENT C. KING, Deceased, Respondents, and MAMIE K. SMITH et al., Appellants.

(Submitted March 19, 1900; decided April 17, 1900.)

Motion for reargument denied, with ten dollars costs. (See 162 N. Y. 134.)

In the Matter of the Application of COLERIDGE A. HART, Appellant, for an Order Requiring the STATE BOARD OF CANVASSERS, Respondents, to Act or Show Cause.

(Submitted April 16, 1900; decided April 20, 1900.)

Renewed motion for reargument denied, with ten dollars costs. (See 161 N. Y. 507; 159 N. Y. 278.)

In the Matter of Proving the Last Will and Testament of
ABIGAIL JOURNEY, Deceased.

MARY L. ENGELBRECHT, Appellant; EDWARD SPRAGUE, as
Executor, et al., Respondents.

(Submitted April 16, 1900; decided April 20, 1900.)

Motion for reargument denied, with ten dollars costs. (See
162 N. Y. 611.)

In the Matter of the Final Judicial Settlement of the Account
of EDWARD SPRAGUE, as Administrator of DAVID H. JOUR-
NEY, Deceased.

MARY L. ENGELBRECHT, Appellant; EDWARD SPRAGUE, as
Administrator, et al., Respondents.

(Submitted April 16, 1900; decided April 20, 1900.)

MOTION for reargument denied, with ten dollars costs.
(See 162 N. Y. 611.)

JOHN R. DRAKE, Appellant, v. THE NEW YORK SUBURBAN
WATER COMPANY et al., Respondents.

THOMAS P. WICKES, as Receiver of the Firm of COFFIN
& STANTON, Appellant.

Reported below, 86 App. Div. 275.

(Argued April 16, 1900; decided April 20, 1900.)

MOTION to dismiss an appeal from an order of the Appellate
Division of the Supreme Court in the second judicial depart-
ment, made at the January term, 1899, reversing a judgment
in favor of plaintiff entered upon a decision of the court on
trial at Special Term, and granting a new trial.

The motion was made upon the ground that, the action
having terminated in favor of the defendant New York

Suburban Water Company, nothing remains for this court to decide but an abstract question of law.

I. M. Dittenhoefer for motion.

George C. Lay opposed.

Motion denied, with ten dollars costs.

MICHAEL SINTEFF, Respondent, *v.* THE PEOPLE'S BUILDING,
LOAN AND SAVING ASSOCIATION, Appellant.

Reported below, 37 App. Div. 840.

(Submitted April 16, 1900; decided April 20, 1900.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered February 18, 1899, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury.

The motion was made upon the grounds that the appeal is frivolous, and taken simply for delay, the appellant's only exception being general and presenting no question of law for the consideration of this court, and that the decision of the Appellate Division was unanimous and without an opinion.

Frank M. Hardenbrook for motion.

Chester M. Elliott opposed.

Motion denied, with ten dollars costs.

JAMES R. JOHNSTON et al., Respondents, *v.* ELIZABETH
DREXEL DAHLGREN, Executrix of JOHN VINTON DAHL-
GREN, Deceased, Appellant.

Reported below, 48 App. Div. 537.

(Argued April 16, 1900; decided April 20, 1900.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial depart-

ment, entered upon an order made March 7, 1900, affirming a judgment in favor of plaintiffs entered upon the report of a referee.

The motion was made upon the grounds, that this court has no jurisdiction of the appeal, the decision of the Appellate Division having been unanimous; that the said Appellate Division has not certified that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals, and that the questions of law raised by the appellant are frivolous.

George C. Lay for motion.

Abram I. Elkus and *David T. Davies* opposed.

Motion denied, with ten dollars costs.

ISAAC W. PARMENTER, Respondent, v. AMERICAN BOX
MACHINE COMPANY, Appellant.

Parmenter v. American Box Machine Co., 44 App. Div. 47, appeal dismissed.

(Argued April 16, 1900; decided April 20, 1900.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered October 31, 1899, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term, a jury having been waived.

The motion was made upon the grounds that this court has no jurisdiction of the appeal, it not having been allowed by the Appellate Division or by a judge of the Court of Appeals, and that the exceptions taken during the trial are frivolous.

George S. Coleman for motion.

Julius M. Mayer opposed.

Motion granted, and appeal dismissed, without costs.

THOMAS D. AUSTIN et al., by THOMAS M. ROWLETTE, their Guardian ad Litem, Appellants, v. LOUIS W. SLOCUM et al., Respondents.

(Submitted April 16, 1900; decided April 20, 1900.)

MOTION to prefer an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 19, 1900, affirming a judgment in favor of defendants, and an order denying a motion for a new trial.

The motion was made upon the ground that the appeal is from an adjudication upon a will in which the executors are joined as parties defendant, and, therefore, is entitled to preference under subdivision 5 of section 791 of the Code of Civil Procedure.

Greene & Stotesbury for motion.

No one opposed.

Motion denied, without costs.

JAMES A. DENNISON, Respondent, v. JAMES B. LAWRENCE, Appellant.

Dennison v. Lawrence, 44 App. Div. 287, appeal dismissed.
(Argued April 16, 1900; decided April 20, 1900.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 10, 1899, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term without a jury, and granting a new trial.

The order appealed from has since been resettled by an order of the Appellate Division, which directed the insertion of the words "upon the law and the facts."

The motion was made upon the grounds that the reversal was upon the facts; that no question of law is presented for

review, and that this court has no jurisdiction to entertain the appeal.

Charles F. Bridge and *Frank M. Hardenbrook* for motion.

Joseph E. Russell, Jr., and *Luke A. Lockwood* opposed.

Motion granted, with costs to appellant up to the date of the amendment of the order appealed from.

RUTH R. HUTTON, Appellant, *v.* THE METROPOLITAN ELEVATED RAILWAY COMPANY et al., Respondents.

Reported below, 19 App. Div. 248.

(Argued April 16, 1900; decided April 20, 1900.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 12, 1897, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term, and granting a new trial.

The motion was made upon the ground that the appeal was not taken within the time and in the manner prescribed by the Code of Civil Procedure.

Sidney Smith for motion.

Charles H. Strong opposed.

Motion denied, with ten dollars costs, on the authority of *Guarantee Trust & Safe Deposit Company v. P., R. & N. E. R. R. Co.* (160 N. Y. 1).

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* SAMUEL J. KENNEDY, Appellant.

(Argued April 16, 1900; decided April 20, 1900.)

MOTION to dismiss an appeal from a judgment of the Supreme Court, New York county, rendered March 31, 1899, convicting the defendant of the crime of murder in the first degree.

The motion was made upon the ground of *laches* on the part of the defendant and his attorney in prosecuting the appeal.

Charles E. Le Barbier for motion.

R. N. Moore opposed.

Motion denied subject to the following conditions: Time to settle case is extended to and including Saturday, the 19th day of May, 1900, if stipulation is entered into by the parties to argue the case at the next June term. Original stipulation when executed to be filed with the clerk of this court.

THE BINGHAMTON TRUST COMPANY, Respondent, *v.* AUGUSTUS G. WALES, as Sheriff of the County of Broome, Appellant.

Reported below, 48 App. Div. 620.

(Argued April 16, 1900; decided April 20, 1900.)

MOTIONS to correct the record by inserting therein a certified copy of a memorandum showing that the decision of the Appellate Division was unanimous, and by striking therefrom certain papers used on a motion to set aside the report of the referee, and to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered September 19, 1899, affirming a judgment in favor of plaintiff entered upon the report of a referee.

The motion to dismiss the appeal was made upon the grounds that the appeal cannot be taken as of right to the Court of Appeals, the judgment of the Appellate Division having been unanimous, and said Appellate Division not having allowed the appeal or certified that questions of law have arisen which ought to be reviewed by this court.

W. J. Welsh for motion.

T. B. Merchant opposed.

Motion to amend record by inserting memorandum or certificate showing that the decision of the Appellate Division was unanimous denied, but without prejudice to an application to the Appellate Division for an order amending the order or judgment of affirmance so as to show that the decision was unanimous.

— Motion to strike from the record the papers used on motion to set aside report of referee granted.

Motion to dismiss appeal denied, without costs.

PHILIP D. ARMOUR et al., Respondents, v. DANIEL GAFFEY et al., Appellants.

Reported below, 30 App. Div. 121.
(Argued April 16, 1900; decided April 20, 1900.)

MOTION to compel appellants to file a new undertaking on appeal from a judgment and order of the Appellate Division of the Supreme Court in the third judicial department, entered May 6, 1898, affirming a judgment in favor of plaintiffs entered upon the report of a referee.

The motion was made upon the ground that since the execution of the undertaking the circumstances of the sureties have become so precarious that there is reason to apprehend that such undertaking is not sufficient for the security of the respondents.

Lewis E. Carr for motion.

John T. Norton opposed.

Motion for new undertaking, etc., denied, without costs.

J. ESLEK ECKERSON et al., Appellants, v. THE VILLAGE OF HAVERSTRAW et al., Respondents.

Eckerson v. Village of Haverstraw, 6 App. Div. 102, affirmed.
(Argued April 3, 1900; decided April 24, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered

June 8, 1896, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term.

Louis Marshall for appellants.

William McCauley, Jr., and *Alonzo Wheeler* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, LONDON and WERNER, JJ. Not sitting: CULLEN, J.

HUGO CAHN et al., Respondents, v. THEODORE STOVER,
Appellant, Impleaded with Others.

Cahn v. Stover, 25 App. Div. 630, affirmed.
(Submitted April 4, 1900; decided April 24, 1900.)

APPEAL from a judgment and order of the Appellate Division of the Supreme Court in the fourth judicial department, entered February 14, 1898, affirming a judgment in favor of plaintiffs entered upon a verdict, and an order denying a motion for a new trial.

John A. Van Arsdale for appellant.

George Clinton for respondents.

Judgment and order affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, LONDON, CULLEN and WERNER, JJ.

CORNELIA T. TERRY, Respondent, v. KATHARINE T. MOORE,
Appellant, Impleaded with Another.

Terry v. Moore, 25 App. Div. 625, affirmed.
(Argued April 4, 1900; decided April 24, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered Janu-

ary 27, 1898, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Charles Edward Souther for appellant.

Flamen B. Candler for respondent.

Judgment affirmed, with costs ; no opinion.

Concur : PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, LONDON, CULLEN and WERNER, JJ.

ANN McCARRAN, Appellant, *v.* HENRY G. COOPER, Respondent, Impleaded with Others.

McCarran v. Cooper, 16 App. Div. 311, affirmed.
(Submitted April 5, 1900; decided April 24, 1900.)

APPEAL from a judgment and order of the Appellate Division of the Supreme Court in the first judicial department, entered, respectively, April 29 and April 19, 1897, affirming a judgment of Special Term sustaining a demurrer to the complaint.

William T. Schley and *J. Brownson Ker* for appellant.

James C. De La Mare for respondent.

Judgment and order affirmed, with costs, on opinion below.

Concur : GRAY, O'BRIEN, HAIGHT, LONDON, CULLEN and WERNER, JJ. Not sitting : PARKER, Ch. J.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* COLONIAL TRUST COMPANY, Appellant, *v.* WILLIAM J. MORGAN, as Comptroller of the State of New York, Respondent.

People ex rel. Colonial Trust Co. v. Morgan, 47 App. Div. 126, affirmed.
(Argued April 16, 1900; decided April 24, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered January 23, 1900, confirming the determination of the

comptroller of the state of New York refusing to revise or readjust the account settled by him against the relator for state franchise taxes on its capital stock for the years ending October 31, 1897 and 1898.

Charles A. Collin and William F. Sheehan for appellant.

H. B. Coman and John C. Davies for respondent.

Order affirmed, with costs, on opinion below.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT and MARTIN, JJ. Absent: VANN, J. Not sitting: LANDON, J.

CARL ARMBRUSTER, Respondent, v. THE AUBURN GAS LIGHT COMPANY, Appellant.

Armbruster v. Auburn Gas Light Co., 18 App. Div. 447, affirmed.
(Argued March 12, 1900; decided May 1, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered August 11, 1897, modifying and affirming as modified a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

John Van Sickle for appellant.

E. C. Aiken for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ.

PETER MCFARLAND, Respondent, v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

McFarland v. N. Y. C. & H. R. R. Co., 20 App. Div. 622, affirmed.
(Argued March 13, 1900; decided May 1, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered

August 10, 1897, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

Albert H. Harris for appellant.

E. C. Aiken for respondent.

Judgment affirmed, with costs; no opinion.

Concur: BARTLETT, MARTIN, VANN and CULLEN, JJ. Dissenting: WERNER, J. Not voting: PARKER, Ch. J. Not sitting: GRAY, J.

THOMAS D. SHERLOCK, Respondent, *v.* THE GERMAN-AMERICAN INSURANCE COMPANY, Appellant.

Sherlock v. German-American Ins. Co., 21 App. Div. 18, affirmed.
(Submitted March 19, 1900; decided May 1, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 7, 1897, modifying and affirming as modified a judgment in favor of plaintiff entered upon a verdict, and affirming an order denying a motion for a new trial.

John F. Clarke for appellant.

Edward M. Grout for respondent.

Judgment affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN and WERNER, JJ. Not sitting: CULLEN, J.

HERMAN SIEFKE, Respondent, *v.* HENRY SIEFKE, as Executor of HENRY SIEFKE, Deceased, Appellant.

Siefke v. Siefke, 36 App. Div. 632, affirmed.
(Argued March 20, 1900; decided May 1, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered

January 9, 1899, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court, and an order denying a motion for a new trial.

Brainard Tolles for appellant.

William Allan for respondent.

Judgment affirmed, with costs ; no opinion.

Concur : PARKER, Ch. J., GRAY, BARTLETT, MARTIN, CULLEN and WERNER, JJ. Not voting : VANN, J.

SAMUEL WELLS, Respondent, *v.* THE CITY OF BROOKLYN,
Appellant.

Wells v. City of Brooklyn, 21 App. Div. 626, affirmed.
(Argued March 22, 1900; decided May 1, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 28, 1897, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

John Whalen, Corporation Counsel (*William J. Carr* of counsel), for appellant.

Frederick E. Crane and *James D. Bell* for respondent.

Judgment affirmed, with costs ; no opinion.

Concur : PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN and WERNER, JJ. Not sitting, CULLEN, J.

BERTHA MAGNER, Respondent, *v.* THE MUTUAL LIFE ASSOCIATION OF THE CITY OF BROOKLYN, Appellant.

Magner v. Mutual Life Assn., 17 App. Div. 13, affirmed.
(Argued March 23, 1900; decided May 1, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered

April 19, 1897, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

David N. Salisbury for appellant.

Elijah W. Holt for respondent.

Judgment affirmed, with costs ; no opinion.

CONCUR : PARKER, Ch. J., GRAY, BARTLETT, MARTIN, VANN, CULLEN and WERNER, JJ.

In the Matter of the Application of THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Relative to Acquiring Title to the Lands, Tenements and Hereditaments Required for the Purpose of Opening Whittier Street from Hunt's Road to Whitlock Avenue, in the Twenty-third Ward of the City of New York.

CHARLES D. DICKEY, Appellant ; THE CITY OF NEW YORK et al., Respondents.

Matter of the Mayor, 46 App. Div. 52, affirmed.

(Argued April 17, 1900; decided May 1, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 8, 1899, reversing an order of Special Term denying a motion to confirm the report of the commissioners of estimate and assessment of the city of New York, and referring the said report back to the commissioners, with a direction to limit the assessments for benefit to one-half of the value of the property assessed as valued by the tax commissioners for the purpose of taxation for the year 1896, and confirming the said report.

Tompkins McIlvaine for appellant.

John Whalen, Corporation Counsel (*John P. Dunn* and *Thomas C. Blake* of counsel), for respondents.

Order affirmed, with costs, on opinion below.

CONCUR : PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN and LANDON, JJ. Absent : VANN, J.

In the Matter of the Application of JAMES B. EVELINE for a Writ of Mandamus.

JAMES B. EVELINE, Appellant; WILLIAM K. MANSFIELD et al., Respondents.

Matter of Eveline, 45 App. Div. 628, affirmed.
(Argued April 17, 1900; decided May 1, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered November 16, 1899, affirming an order of Special Term denying an application for a peremptory writ of mandamus.

J. W. Atkinson for appellant.

Thomas O'Connor for respondents.

Order affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT and MARTIN, JJ. Absent: VANN, J. Not sitting: LANDON, J.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. CLINTON H. SMITH, Appellant, v. PETER C. DOYLE et al., Composing a Board of Examination Appointed by General Orders No. 7, Headquarters State of New York, Adjutant-General's Office, May 1, 1899, et al., Respondents.

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People ex rel. Smith v. Doyle, 44 App. Div. 402, affirmed.
(Submitted April 17, 1900; decided May 1, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 27, 1899, affirming an order of Special Term denying an application for a writ of prohibition.

Alexander S. Bacon for appellant.

John H. Coyne and *John C. Davies* for respondents.

Order affirmed, with costs, on opinions below.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ.

In the Matter of the Petition of OTTO H. GEORGI, as Administrator of COSSUTH L. GEORGI, Deceased, for the Disposition of Lands and Property of said Decedent for the Payment of Debts.

OTTO H. GEORGI, Administrator, Appellant; PETER DALY, Purchaser, Respondent.

Matter of Georgi, 44 App. Div. 180, affirmed.

(Submitted April 17, 1900; decided May 1, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, made November 11, 1899, affirming an order of the Surrogate's Court of New York county deuying a motion to compel the completion of the purchase of certain real property and granting the motion of the purchaser to be released therefrom.

John Aitken for appellant.

David McClure for respondent.

Order affirmed, with costs, on opinion below.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JOHN LANG, JR., Appellant, v. BERNARD J. YORK et al., as Police Commissioners of the City of New York, Respondents.

People ex rel. Lang v. York, 45 App. Div. 459, affirmed.

(Submitted April 17, 1900; decided May 1, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, made December 8, 1899, reversing an order of Special Term granting a peremptory writ of mandamus directing the reinstatement of the relator to the position of patrolman on the police force of the city of New York.

Philip Carpenter for appellant.

John Whalen, Corporation Counsel (Theodore Connoly and Terence Farley of counsel), for respondents.

Order affirmed, with costs, on the prevailing opinion below.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ.

In the Matter of the Application of THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK Relative to Acquiring Title to the Lands, Tenements and Hereditaments Required for the Purpose of Opening One Hundred and Seventy-fifth Street from the Grand Boulevard and Concourse to Anthony Avenue, in the Twenty-fourth Ward of the City of New York.

THE CITY OF NEW YORK, Appellant and Respondent; THOMAS O. WOOLF, Respondent and Appellant; FRITZ SELJE et al., Respondents.

Matter of East 175th Street, 49 App. Div. 114, affirmed.
(Argued April 17, 1900; decided May 1, 1900.)

CROSS-APPEALS from an order of the Appellate Division of the Supreme Court in the first judicial department, entered March 21, 1900, modifying and affirming as modified an order of Special Term denying a motion to confirm the report of the commissioners of estimate and assessment of the city of New York and referring the said report back to the commissioners with a direction to limit the assessments for benefit to one-half of the value of the property assessed as valued by the tax commissioners for the purpose of taxation, as of the time when title vested herein, and confirming the said report.

John Whalen, Corporation Counsel (John P. Dunn and Thomas C. Blake of counsel), for the city of New York, appellant and respondent.

William A. Hoar and James A. Deering for Thomas O. Woolf, respondent and appellant.

Joseph A. Flannery, Charles V. Gabriel, Ernest Hall and Thomas S. Bassford for respondents.

Order affirmed, with costs, on opinion below.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN and LANDON, JJ. Absent: VANN, J.

FELIX J. GALLAGHER, Respondent, *v.* WILLIAM C. BRYANT et al., Appellants.

Gallagher v. Bryant, 44 App. Div. 527, affirmed.
(Argued April 17, 1900; decided May 1, 1900.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the second judicial department, made November 21, 1899, reversing an interlocutory judgment of Special Term sustaining a demurrer to the complaint.

The question certified was as follows: "Does the complaint state facts sufficient to constitute a cause of action?"

George H. Fisher for appellants.

Charles Lex Brooke for respondent.

Order affirmed, with costs, and question certified answered in the affirmative on opinion below.

Concur: PARKER, Ch. J., BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ. Dissenting: O'BRIEN, J.

ANTHONY ECKERT, Respondent, *v.* FREEMAN M. VILAS et al.,
Impleaded with Others, Appellants.

Reported below, 29 App. Div. 627.
(Submitted April 28, 1900; decided May 1, 1900.)

MOTION to put on calendar and prefer an appeal from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 12, 1898, affirm-

ing a judgment in favor of plaintiff entered upon a decision of the Erie County Court decreeing the foreclosure and sale of certain premises.

The motion was made upon the grounds that the appeal is without merit and taken solely for delay, and that unless it can be heard and disposed of at once, there is great danger that the rights of the plaintiff will be irretrievably lost.

Morris Cohn, Jr., for motion.

Wheeler & Woodward opposed.

Motion denied, without costs, without prejudice to respondent's right to move to dismiss appeal.

CHARLES F. SCHOEPLIN, Respondent, *v.* MICHAEL J. COFFEY,
Appellant.

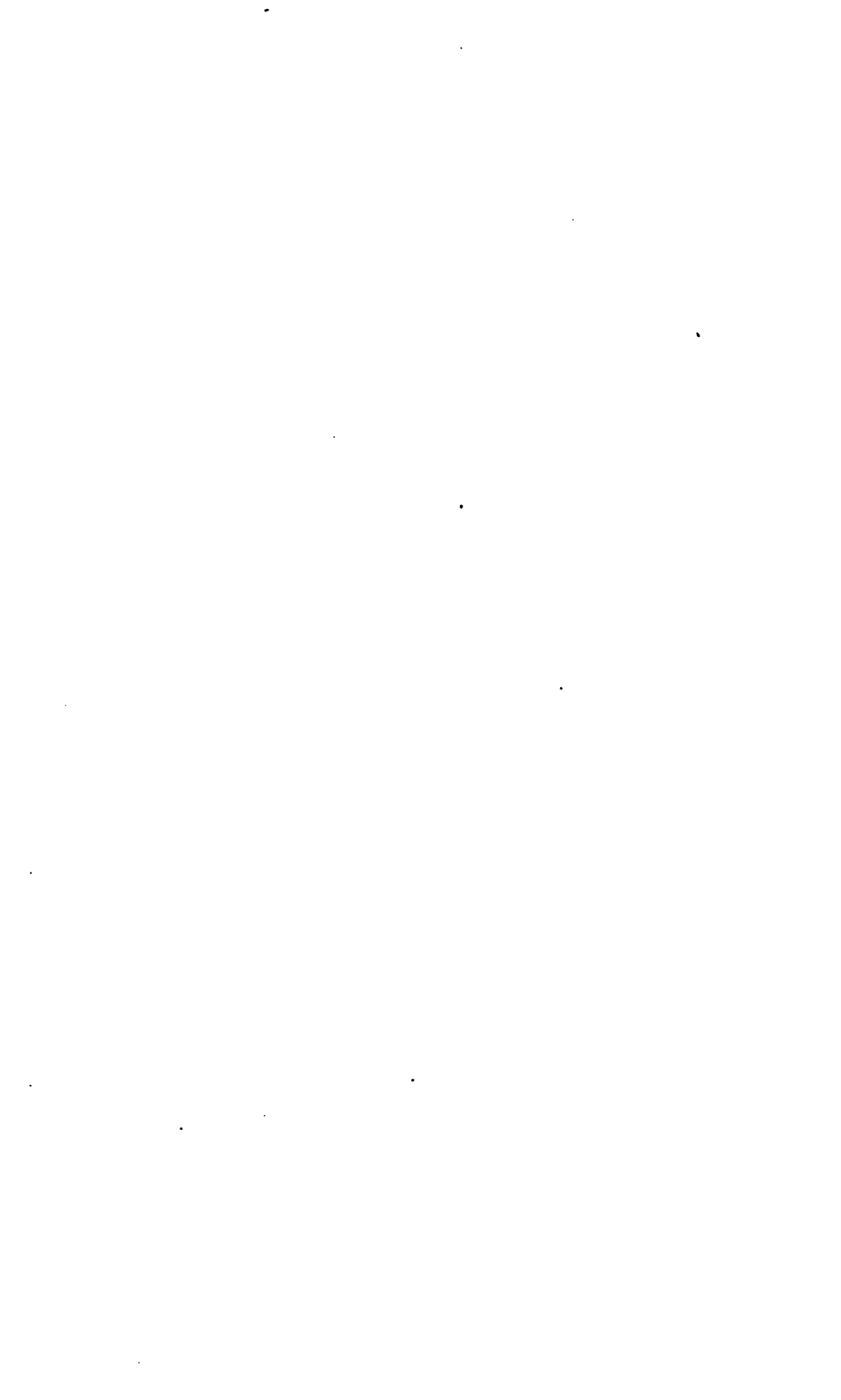
(Submitted April 2, 1900; decided May 1, 1900.)

Motion for reargument denied, with ten dollars costs. (See 162 N. Y. 12.)

ALBERT L. PURDY, Respondent, *v.* ERIE RAILROAD COMPANY,
Appellant.

(Submitted April 16, 1900; decided May 1, 1900.)

Motion for reargument denied, with ten dollars costs. (See 162 N. Y. 42.)



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APPEAL.

1. *Court of Appeals Prohibited from Reviewing Sufficiency of Evidence.* Where the Appellate Division has unanimously affirmed a judgment below, and subsequently allows an appeal therefrom upon a question of law, the Court of Appeals has no power to examine or determine whether there is any or sufficient evidence to sustain the verdict. *Lewis v. Long Island R. R. Co.* 52

2. *Exception.* Appellate courts should not be diligent in seeking a way to deprive a party of the benefits of an exception pointing out error, where it appears that the trial court was fully apprised of the nature of the objection. *Stephens v. Ely.* 79

3. *Failure to Repeat.* The suggestion to counsel by the trial justice, in the interest of expedition and orderly procedure, that one exception is as good as many, acquiesced in by them, should not be allowed to operate as a trap to ensnare the rights of clients. *Id.*

4. *Evidence not Reviewable Notwithstanding Allowance of Appeal from Unanimous Decision.* The Court of Appeals cannot review the sufficiency of the evidence to sustain a verdict after a unanimous affirmance by the Appellate Division, in an action for personal injuries, notwithstanding the allowance of an appeal, but can consider only such questions of law as are raised by proper exceptions. *Kleiner v. Third Ave. R. R. Co.* 198

5. *Reversal by Appellate Division.* The Court of Appeals has no power to review the determination of the Appellate Division in reversing a decree of the surrogate upon the facts. *Matter of Thorne.* 238

6. *Question of Fact — When Presented.* A question of fact, which the Court of Appeals has no jurisdiction to review, is involved upon an appeal from an order of the Appellate Division reversing, "upon the

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facts and the law," a decree of the Surrogate's Court confirming the report of an appraiser levying a transfer tax, where the surrogate rejected and the Appellate Division accepted the version of the beneficiary's story most favorable to herself. *Id.*

7. *Review of Order Based upon Want of Power.* Where an order appealed from states that the determination of the Appellate Division was based upon a want of power to grant the application, without considering the question of discretion, a question of law is presented which it is the duty of the Court of Appeals to review, even if the courts below might have denied the application in the exercise of discretion. *Matter of Thurber.* 244

8. *Order of Appellate Division Dismissing Appeal.* No appeal can be taken to the Court of Appeals from an "order" of the Appellate Division dismissing an appeal from the judgment below; but the proper practice is to enter a judgment of dismissal upon the order and then appeal from such judgment. *Stevens v. Central Nat. Bank.* 258

9. *Final Judgment on Reversal.* The Appellate Division has no power, upon reversing a judgment which dismisses the complaint in a creditor's action, to render a final judgment in plaintiff's favor, where the facts were not found by the trial court and there was a question of fraud in the case which did not depend upon documentary evidence, but upon conflicting oral testimony, and it is obvious that further evidence relating thereto may be produced upon a new trial. *Ross v. Claywood.* 259

10. *Exception to Decision Dismissing Complaint.* To enable the Appellate Division to review a judgment based upon a decision of the trial court in an action tried without a jury, which merely dismisses the complaint, an exception to the decision is necessary whether such decision was made under section 1021 or 1022 of the Code of Civil Procedure. *Id.*

11. *Exception to Ruling upon Question of Law.* A decision under section 1021 of the Code of Civil Procedure, which merely dismisses the plaintiff's complaint without making any findings of fact, is a ruling upon a question of law made after the cause is finally submitted, and an exception must be taken thereto in order to present the question to a court of review. *Id.*

12. *Failure to Take Exception—Waiver.* The right to object in the Court of Appeals to the failure of the adverse party to take an exception to the decision of the trial court is not waived by failing to make it the subject of a distinct point in the Appellate Division or to make the specific claim that the latter court had no jurisdiction to review the decision, and by stating in such court that the sole question in the case was one relating to the merits, where the brief in such court called attention to the lack of exceptions. *Id.*

13. *Non-reviewable Order.* An order and judgment of the Appellate Division reversing an interlocutory judgment and granting a new trial is not reviewable by the Court of Appeals upon the ground that it is an appeal from an order granting a new trial upon a motion made upon exceptions under section 1001 of the Code of Civil Procedure, where the record fails to disclose that the Appellate Division in any way disposed of or decided the exceptions. *Townsend v. Van Buskirk.* 265

14. *Review of Nonsuit.* A judgment dismissing a complaint, on the ground that plaintiff had failed to make out a cause of action, entered without a decision of the trial court upon the facts established at the trial, is a judgment upon a nonsuit, and may be reviewed in the Court of Appeals. *Ware v. Dos Passos.* 281

15. *Questions of Law Reviewable.* An appeal by permission, under subdivision 2 of section 191 of the Code of Civil Procedure, from an unanimous affirmance by the Appellate Division, in an action brought to set

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aside a sale as in fraud of the rights of creditors, differs from an appeal allowed under section 190 in that it is not restricted to questions certified by the Appellate Division, but all questions of law raised by exceptions and presented by the record may be reviewed except the legal question as to the sufficiency of the evidence to sustain a finding of fact or a verdict not directed by the trial court. *Commercial Bank v. Sherwood.* 310

16. *Certificate of Appellate Division.* Questions of law need not be formulated and certified by the Appellate Division in its order granting leave to appeal under subdivision 2 of section 191 of the Code of Civil Procedure, which simply requires that the court certify "that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals." *Id.*

17. *Review of Judgment Entered upon a Special Verdict.* Section 1338 of the Code of Civil Procedure has no application to a judgment entered upon a verdict, and the Court of Appeals has no jurisdiction to review an order of the Appellate Division reversing a judgment entered upon a special verdict and granting a new trial, when it does not appear that the facts as found by the verdict were affirmed or approved by the Appellate Division. *Schryer v. Fenton.* 444

18. *Modification by Appellate Division of Order Stating Account of Committee of Incompetent.* The Appellate Division has no power, upon reversing in part an order of Special Term charging the committee of an incompetent person with a certain sum upon the report of a referee appointed to take and state the account, to determine the facts anew and direct a judgment or order based upon the facts thus determined; it should remit the case to the court below for readjustment of the account. *Matter of Chapman.* 456

19. *Final Order.* An order stating an account of a committee of an incompetent is a final order in a special proceeding, and upon an appeal therefrom the procedure, the rights of the parties and the rules of law are in all respects the same as in an action where the same issues are involved. *Id.*

20. *By Bank in Creditor's Suit to Reach Deposit.* A bank which has paid out money, whether intentionally or by inadvertence, on a check presented pending a creditor's suit which the bank was defending and which involved the question whether or not the money had been transferred to the depositor by her husband in fraud of creditors, is entitled to a review, on its own appeal, of a judgment against it in favor of the creditor without any appeal by the depositor, since the bank is subrogated to her rights. *Albro Co. v. Fountain.* 498

21. *Review of Final Order or Final Judgment as to Alimony.* A reversal by the Appellate Division of an order of the Special Term, granting an application to modify a decree for alimony by reducing the amount, is reviewable by the Court of Appeals, since it is either a final order in a special proceeding or a final judgment in an action. *Wetmore v. Wetmore.* 503

22. *Reversal, not Stated to be upon the Facts.* An order of the Appellate Division reversing a decision on a motion to reduce an award for alimony must be presumed by the Court of Appeals, under section 1338 of the Code of Civil Procedure, to have been made upon the law, where the order does not contain any statement that the reversal was upon the facts. *Id.*

23. *Allowance to Counsel in Capital Case.* An allowance of compensation to counsel for services rendered on appeal to the Court of Appeals, in pursuance of an assignment in a capital case, is proper, although the sum of \$500 has been allowed by the trial court for services rendered at

APPEAL — Continued.

the trial, as section 308 of the Code of Criminal Procedure, limiting such compensation to that amount, applies to the trial and appellate courts separately and not collectively. *People v. Ferraro.* 545

See CONSTITUTIONAL LAW, 4; CORPORATIONS; CRIMES, 4; INTEREST, 3; LIBEL, 1, 4; RAILROADS, 9.

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BANKING.

1. *National Bank — Not Entitled to an Equitable Lien upon its Own Shares, Transferred by its Debtor to a Bona Fide Purchaser.* A national bank, incorporated under the National Banking Act of 1864 (18 U. S. Statutes at Large, 110), is not entitled, as against a *bona fide* purchaser, to an equitable lien upon its shares of capital stock for a debt which the stockholder had previously incurred to the bank, although a notice printed upon their face, based upon a by-law of the bank, prohibited any transfer without the consent of the directors, by any stockholder liable to the bank as a debtor, and declared such liability to be a lien upon the stock, inasmuch as the act prohibits loans by the bank upon the security of its own shares, and thus renders any by-law in contravention thereof, or any statement based thereon, inoperative. *Buffalo German Ins. Co. v. Third Nat. Bank.* 163

2. *Distinction between Executed and Executory Contracts.* Whatever force may have been given, in the case of executed contracts, to the doctrine that only the government can, by charter proceedings, question a transaction between a national bank and its debtor, violative of the provisions of the Banking Act, that doctrine can have no force in a case where such a bank is seeking to create, as against a third person who is a *bona fide* purchaser of its shares, a lien based upon an implied executory contract, and in face of a statutory provision that the bank shall not have such a lien or take such a security. *Id.*

3. *Notice to Purchaser — Not Inferable from Unauthorized By-law Printed on the Face of the Shares.* The fact, that such an unauthorized by-law is printed on the face of the shares, cannot be notice to a *bona fide* purchaser of them that his purchase will be subject to a lien upon the part of the bank for the indebtedness of the stockholder to it. *Id.*

See BONDS, 3; RECEIVERS, 1.

BILLS, NOTES AND CHECKS.

1. *Promissory Note — Burden of Proof.* Proof that a promissory note was fraudulent as between the payee and makers shifts to a transferee, suing thereon, the burden of proof, and it becomes necessary for him to show not only the payment of value by him, but the circumstances under which he became the holder of the note. *Citizens' Nat. Bank v. Weston.* 118

2. *Trial — Instruction as to Bona Fides.* In an action against the members of a partnership as makers, by the transferee, of a promissory note, an instruction that the jury might consider, as bearing upon the question of plaintiff's status as a *bona fide* holder, the fact that none of its officers or agents took the stand after the burden of proof had been shifted to it by defendant's proof that the note was fraudulent as between the makers and the payee, *held*, in view of the state of the record when defendants rested, not to constitute reversible error. *Id.*

3. *Instruction as to Bona Fides.* It is not prejudicial error for the court in such an action, to instruct the jury that in passing upon the question whether plaintiff knew at the time it discounted, for the payee, the note in suit, which was not on interest, that it had been given for the payee's accommodation, they may consider the fact that it had already run one year and seven months before that time and was due in a month thereafter. *Id.*

4. *Partnership — Notice of Dissolution.* It is reversible error for the court in such an action to instruct the jury, in substance, that the plaintiff, in law, had been notified of the dissolution of the defendant firm where it appears that notice thereof had been communicated to two commercial agencies, that one or two newspapers in the vicinity had published a local item of the dissolution and that printed notices thereof had been sent out by the firm's corporate successor in its business letters; these facts are insufficient to charge the plaintiff, assumed to be a non-dealer with the firm, and thus only entitled to general notice, with notice of its dissolution, since to make a general notice legally effectual the only safe rule is that it be seasonably published in one or more of the newspapers in the immediate vicinity. *Id.*

5. *Instruction — Statement Contrary to Evidence.* It is prejudicial error for the court to charge in such an action that so far as the payee's evidence shows, the plaintiff made no inquiry with reference to the makers or their financial standing except, "he says, they consulted a commercial report," where, during the payee's examination, a letter from the cashier of another bank to the vice-president of plaintiff was introduced, in which the writer stated that the paper of the makers held by the payee was good beyond question, and it was proved that the makers were rated in one commercial report as worth over a million dollars, notwithstanding that the statement had reference to the first considerable discount of the makers' paper made by plaintiff and that the court read the letter to the jury. *Id.*

6. *Action on Promissory Notes.* An action on promissory notes, which are due according to their terms, and which were given as the consideration for advertising to be performed under a contract, will not be postponed until its completion, where there is no such provision in the contract and the notes are absolute in their terms. *Desmond-Dunne Co. v. Friedman-Doscher Co.* 486

BONA FIDE PURCHASER.

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BONDS.

1. *Corporations.* The title to the property of a company is in the fictitious entity called the corporation, and its officers and agents only have authority to act for it. *Buffalo L. T. & S. D. Co. v. Medina Gas & El. L. Co.* 67

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2. *Corporate Bonds — Unlawful Diversion.* The transfer of corporate bonds by the secretary of the corporation to the mortgage trustee, as collateral security for an individual loan to him by the latter, the day after the trustee by its secretary signed the certificates upon the bonds, is an unlawful diversion of the bonds, notwithstanding that the secretary of the mortgagor corporation owned all but two of the shares of the capital stock, where the bonds were issued under a resolution, spread upon the face of the mortgage securing them, providing for the borrowing of money to pay the corporation's existing indebtedness and for other lawful purposes, and authorizing the president to negotiate the bonds. *Id.*

3. *Bona Fide Holder — Inquiry.* A bank which, after levying an attachment on the interest of its debtor in bonds of a corporation of which he was the secretary, and the owner of all but two of its shares of capital stock, at his request, paid his private indebtedness to the trustee in the mortgage securing the bonds, and took a transfer of them from the latter, with which they had been unlawfully pledged as collateral security for the debt, is not bound, in order to acquire the status of a *bona fide* holder, to make any further inquiries after being informed by the secretary of the corporation and the secretary and treasurer of the trustee that the bonds were good and valid securities, notwithstanding that eight coupons, representing past-due semi-annual installments of interest accruing while the bonds were in pledge, were still attached thereto and apparently unpaid, the other stockholders, who were directors, not appearing to have actively participated in the affairs of the corporation. *Id.*

4. *Past-due Interest Coupons.* Corporate bonds do not stand dishonored upon their face and deprived of their negotiability so as to prevent a transferee from acquiring the status of a *bona fide* holder, because eight coupons representing past-due unpaid installments of interest are attached thereto, notwithstanding that the bonds provide that they shall become due, principal and interest, upon default in payment of any installment of interest for six months after maturity and demand. *Id.*

5. *Transfer after Default in Interest — Demand.* The court will not, in order to deprive one of the status of a *bona fide* holder of corporate bonds, assume that a demand for the payment of past-due interest had been made so as to mature the bonds before the purchase, merely because of the commencement, before that time, of a suit to foreclose the mortgage securing the bonds which, for some undisclosed reason, was discontinued. *Id.*

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CARRIERS.

1. *Railroad — Liability for Loss of Trunk Containing Merchandise — Notice that it Contains Goods, not Baggage, a Question of Fact.* A railroad company is liable to the assignee of a commercial firm for the loss of a trunk containing merchandise in charge of its traveling salesman, and which is checked as baggage upon one of its passenger trains,

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in an action upon an independent agreement for its transportation as freight, when the company has notice through its agent that it contains goods and not baggage — and this may be given by other means than the direct statement of the salesman, when he seeks to check it, that the trunk contains merchandise, as it may be inferred from the facts surrounding the transaction which are properly submitted to the jury or to the trial court upon the question. *Trimble v. N. Y. C. & H. R. R. Co.* 84

2. *Failure of Baggage-man to Comply with Rule Requiring Release from Liability.* When with notice that a trunk contains merchandise, the baggage-man of a railroad company, contrary to one of its rules, which is unknown to the salesman, checks it as baggage without exacting a release from liability, the company will not be relieved from responsibility for its loss as freight, as the baggage-man stands in the place of the company and it is bound by his acts. *Id.*

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CODE OF CIVIL PROCEDURE.

1. § 191 — *Appeal — Questions of Law Reviewable.* An appeal, by permission, under subdivision 2 of section 191 of the Code of Civil Procedure, from an unanimous affirmance by the Appellate Division, in an action brought to set aside a sale as in fraud of the rights of creditors, differs from an appeal allowed under section 190 in that it is not restricted to questions certified by the Appellate Division, but all questions of law raised by exceptions and presented by the record may be reviewed except the legal question as to the sufficiency of the evidence to sustain a finding of fact or a verdict not directed by the trial court. *Commercial Bank v. Sherwood.* 310

2. *Idem — Certificate of Appellate Division.* Questions of law need not be formulated and certified by the Appellate Division in its order granting leave to appeal under subdivision 2 of section 191 of the Code of Civil Procedure, which simply requires that the court certify "that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals." *Id.*

3. § 812 — *Right of Surety Company to be Released — When not Waived.* Fidelity and surety companies, being authorized to contract as sureties upon official bonds under section 812 of the Code of Civil Procedure, are not excepted from the provisions thereof, authorizing "sureties upon certain official bonds to petition for release from liability" thereunder, and can avail themselves, in proper cases, of such remedies as the Code provides for sureties generally; and a surety company does not waive such rights by accepting a contract of indemnity which expressly provides that acceptance of security or consideration should not "limit or abridge any right or remedy which the surety otherwise might have." *Matter of Thurber.* 244

4. *Idem — Discretionary Power of Court.* The provision of section 812 of the Code of Civil Procedure, that the court "must issue an order" to the principal requiring him "to show cause" why he should not account and give new sureties, is not a mere substitute for a notice of motion,

CODE OF CIVIL PROCEDURE—Continued.

but is part of a special remedy and implies that cause may be shown. The court has a discretion to exercise depending on the facts in the case, and is not commanded to make a decree requiring the principal to show cause regardless of those facts. The expression "a decree must be made" means, under the circumstances, "a decree may be made." *Id.*

5. § 1001—*Appeal—Non-reviewable Order.* An order and judgment of the Appellate Division reversing an interlocutory judgment and granting a new trial is not reviewable by the Court of Appeals upon the ground that it is an appeal from an order granting a new trial upon a motion made upon exceptions under section 1001 of the Code of Civil Procedure, where the record fails to disclose that the Appellate Division in any way disposed of or decided the exceptions. *Townsend v. Van Buskirk.* 265

6. § 1021—*Exception to Decision Dismissing Complaint.* To enable the Appellate Division to review a judgment based upon a decision of the trial court in an action tried without a jury, which merely dismisses the complaint, an exception to the decision is necessary whether such decision was made under section 1021 or 1022 of the Code of Civil Procedure. *Ross v. Caywood.* 259

7. *Idem—Exception to Ruling upon Question of Law.* A decision under section 1021 of the Code of Civil Procedure, which merely dismisses the plaintiff's complaint without making any findings of fact, is a ruling upon a question of law made after the cause is finally submitted, and an exception must be taken thereto in order to present the question to a court of review. *Id.*

§ 1022. See par. 6, this title.

8. § 1338—*Appeal—Review of Judgment Entered upon a Special Verdict.* Section 1338 of the Code of Civil Procedure has no application to a judgment entered upon a verdict, and the Court of Appeals has no jurisdiction to review an order of the Appellate Division reversing a judgment entered upon a special verdict and granting a new trial, when it does not appear that the facts as found by the verdict were affirmed or approved by the Appellate Division. *Schryer v. Fenton.* 444

9. *Idem—Reversal not Stated to be upon the Facts.* An order of the Appellate Division reversing a decision on a motion to reduce an award for alimony must be presumed by the Court of Appeals, under section 1338 of the Code of Civil Procedure, to have been made upon the law, where the order does not contain any statement that the reversal was upon the facts. *Wetmore v. Wetmore.* 503

10. § 1361—*Final Order.* An order stating an account of a committee of an incompetent is a final order in a special proceeding, and upon an appeal therefrom the procedure, the rights of the parties and the rules of law are in all respects the same as in an action where the same issues are involved. *Matter of Chapman.* 456

11. § 2038—*Habeas Corpus—Liability of Sheriff for Discharge of Civil Debtor from Imprisonment.* A county judge has no power, upon the return to a writ of habeas corpus, to order the discharge of an executrix, committed to jail for a civil contempt in failing to pay certain sums of money to persons named in a surrogate's decree, where no notice has been given to the persons who have an interest in continuing the imprisonment or restraint, or to their attorney; such an order is void under subdivision 1 of section 2038 of the Code of Civil Procedure, and affords no protection to a sheriff, in a proceeding to punish him for a civil contempt in releasing her from custody, because made by an officer of limited statutory jurisdiction without taking the necessary jurisdictional steps, if the order contains no recital of jurisdictional facts and the sheriff cannot prove such facts by extrinsic evidence. *Matter of Leggat.* 437

12. § 2695—*Ancillary Letters Testamentary—Jurisdiction of Surrogate—Collateral Attack.* Ancillary letters granted by a surrogate in case

CODE OF CIVIL PROCEDURE — Continued.

of a will of personal property, upon a petition stating that the will was executed in Louisiana, while an accompanying transcript of the record of probate in Louisiana clearly shows that the will was executed in the state of Alabama, and that the testatrix resided in that state at the time of her death, are subject to collateral attack for want of jurisdiction, since the power of the surrogate, under section 2695 of the Code of Civil Procedure, to grant ancillary letters upon a foreign probate of a will of personal property made by a non-resident, is limited to the case of probate in the state or territory where the will was executed or where the testator resided at the time of his death. *Taylor v. Syme.* 513

13. § 2730 — *Executors and Administrators — Power of Surrogate to Deny Commissions.* A surrogate may, in his discretion, upon the settlement of an executor's accounts, deny him the statutory commissions if he has been guilty of misconduct, as the language of section 2730 of the Code of Civil Procedure, providing that on the settlement of the account of an executor or administrator, the surrogate "must allow to him for his services" the commissions fixed by law, is not necessarily exclusive of all discretion in the surrogate, and its exercise should be left to him upon the facts. *Mutter of Rutledge.* 81

CODE OF CRIMINAL PROCEDURE.

1. § 308 — *Allowance to Counsel on Appeal in Capital Case.* An allowance of compensation to counsel for services rendered on appeal to the Court of Appeals, in pursuance of an assignment in a capital case, is proper, although the sum of \$500 has been allowed by the trial court for services rendered at the trial, as section 308 of the Code of Criminal Procedure, limiting such compensation to that amount, applies to the trial and appellate courts separately and not collectively. *People v. Ferraro.* 545

2. § 376 — *Qualification of Trial Juror — Preformed Opinion.* The testimony of a juror on his examination, that he has formed an opinion that the accused is guilty from the fact that he was removed from his church by the bishop, and that he would naturally be influenced by the action of the bishop, constitutes *prima facie* a disqualification, which must be removed in the method provided by section 376 of the Code of Criminal Procedure, by his declaration on oath "that he believes that such opinion or impression will not influence his verdict, and that he can render an impartial verdict according to the evidence." *People v. Flaherty.* 532

3. *Idem* — *Insufficient Declaration of Juror.* A juror's declaration on oath that he could render a fair and impartial verdict upon the evidence brought out on the trial, does not remove a *prima facie* disqualification arising from his testifying that he has an opinion as to the guilt or innocence of the accused, where he does not declare on oath, as required by the statute, "that he believes that such opinion or impression will not influence his verdict." *Id.*

COMITY.

See RECEIVERS, 1.

COMMISSIONS.

See EXECUTORS AND ADMINISTRATORS, 1.

COMPENSATION.

See APPEAL, 23.

COMPTROLLER.

See TAX, 5.

COMPTROLLER'S DEED.

See TAX, 3, 4.

CONDEMNATION PROCEEDINGS.

See RAILROADS, 7

CONFESSIONS.*See* CRIMES, 2-4.**CONSENTS.***See* RAILROADS, 8-10.**CONSPIRACY.***See* EVIDENCE, 15.**CONSTITUTIONAL LAW.**

1. *Mileage Book Act — Constitutional as to Subsequent Corporations.* The Mileage Book Act (L. 1895, ch. 1027), although declared by the Supreme Court of the United States unconstitutional as to railroad corporations theretofore incorporated, is constitutional as to a railroad corporation thereafter incorporated in the state of New York, and whose franchises and property rights, so far as the record shows, have accrued subsequent to the enactment of the statute. *Purdy v. Erie R. R. Co.* 42

2. *Burdens not Increased by L. 1896, Ch. 835.* The amendment to said Mileage Book Act of 1895 (L. 1896, ch. 835) did not increase the burdens of railroad corporations, and hence the amendment is constitutional in all cases where the original act would be upheld. *Id.*

3. *Mileage Book Acts — Not Regulations of Interstate Commerce.* Statutes, relative to mileage books, when limited to railroad transportation wholly within the state, are a valid exercise of the power of the state and are not regulations of interstate commerce. *Id.*

4. *Appeal.* The objection, that statutes invade the property rights of a corporation in violation of the State or Federal Constitutions, is not available in the Court of Appeals unless it has been taken below. *Id.*

5. *Mileage Book Act, Unconstitutional as to Existing Corporations.* The Mileage Book Act (L. 1895, ch. 1027), requiring railroad companies to issue mileage books under a penalty for refusal to do so, is unconstitutional as to corporations existing at the time of its enactment, since the statute is an illegal invasion of the property rights of such corporations, as declared by a decision of the United States Supreme Court. *Beardsley v. N. Y., L. E. & W. R. R. Co.* 230

6. *Enforcement of Foreign Decree.* In an action here upon a foreign decree, for alimony, the provision of the Federal Constitution that full faith and credit shall be given in each state to the judicial proceedings of every other state (U. S. Const. art. 4, § 1), requires the courts of this state to give it full credit and effect as a judicial debt of record against the defendant for the amount fixed at the time of its rendition, but the law of this state does not permit the plaintiff, in aid of a judgment recovered upon the decree, to invoke the equitable remedies provided by the Code of Civil Procedure for the enforcement of a decree for alimony, inasmuch as they are available only in aid of decrees of divorce rendered in this state. *Lynde v. Lynde.* 405

7. *Provision for the Payment of Future Alimony.* A provision in such foreign decree for the payment of alimony in the future, however, remaining subject to the discretion of the foreign court, lacks that conclusiveness which requires the courts of this state to enforce it, inasmuch as the provision of the Federal Constitution referred to should be deemed to relate to judgments or decrees which not only are conclusive in the jurisdiction where rendered, but which are final in their nature. *Id.*

8. *Equitable Remedies not Enforceable in this State.* Provisions in such decree for methods to enforce payment, and a subsequent order which sought to carry it into effect by the equitable remedies of a receivership and injunction, cannot be enforced in this state, because they are in the nature of execution and operative upon the defendant only as he or property belonging to him may be found within the jurisdiction of the foreign court. *Id.*

9. *Corporations, When Charitable.* A charitable institution, within the meaning of sections 11 to 14 of article 8 of the Constitution, chapter 771

CONSTITUTIONAL LAW — *Continued.*

of the Laws of 1895, and chapter 546 of the Laws of 1896, giving to the state board of charities the right of visitation with respect to all charitable institutions, is one that in some form or to some extent receives public money for the support and maintenance of indigent persons, and by public money is meant money raised by taxation not only in the state at large, but in any city, county or town. *People ex rel. Bd. Charities v. N. Y. Soc. P. C. C.* 429

10. *Private Charitable Institution not Subject to State Inspection.* A purely private institution, which, without any compensation from the public, cares for or maintains indigent adults or children who voluntarily seek it as a home, or who remain there voluntarily, is not subject to state inspection or regulation. *Id.*

See FLATBUSH (TOWN OF), 2.

CONTEMPT.

See HABEAS CORPUS.

CONTRACT.

1. *Stipulated Test of Machinery Excused when the Other Party Failed to Furnish the Power as Agreed.* Where a contractor agreed to furnish and erect air propellers for removing smoke from the tempering room of a manufacturing company, to run with power furnished by the company, the work of construction to be performed to the satisfaction of the engineer of the company, and subject to its approbation after a thirty days' trial, and the contractor having obtained the certificate of the engineer that the apparatus was properly constructed, but such trial could not be made because the company failed to furnish the power, the contractor is relieved from such test and is entitled to recover the contract price, under the rule that where the obligation of one party to perform is dependent upon prior action by the other, the refusal of the latter to perform dispenses with the obligation of the former. *Howard v. American Mfg. Co.* 847

2. *New York City—Failure of Board of Education to Appropriate Money for Contract for School Repairs.* The failure of the board of education of the city of New York to make an appropriation, authorized and permitted by the provisions of the Consolidation Act (L. 1882, ch. 410), to pay a contractor for erecting a retaining wall for a public school building, under a contract approved and ratified by the board, does not invalidate such contract and preclude a recovery by the contractor where he performed the work in good faith, without knowledge that the appropriation had not been made, and he had no means, under the statute, of protecting himself against the board's exhausting appropriations available and sufficient, at the time the contract was made, to pay for the work. *Van Dolsen v. Board of Education.* 446

3. *Employment for Life—When Unreasonable.* A contract by which a person was employed for life, made by the executive officers of a life insurance company assuming to act under a by-law, previously adopted by the board of trustees, empowering them "to appoint, remove and fix the compensation of each and every person except agents employed by the company," is unreasonable, and not contemplated thereby, because, the term of office of said trustees being limited by statute, it must be assumed that they would not adopt a by-law authorizing the imposition of unreasonable contracts upon their successors in office. *Carney v. N. Y. Life Ins. Co.* 453

4. *Substantial Performance.* The right of a party to enforce a contract will not be forfeited by reason of inadvertent or unimportant omissions, but a substantial performance which will entitle him to recover may be made without a literal compliance as to all details. *Desmond-Dunne Co. v. Friedman-Doscher Co.* 486

See BANKING, 2; INSURANCE, 1-4; SPECIFIC PERFORMANCE, 1-3.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 1, 8, 12.

CORPORATIONS.

Judgment Suffered by an Officer with Intent to Prefer a Creditor — L. 1892, Ch. 688, § 48 — Review of Order of Reversal not Stated to be upon the Facts. Where, in an action brought by a receiver of a corporation, appointed in proceedings for its dissolution, to set aside a judgment recovered against it, by default, as violative of the provisions of the Stock Corporation Law (L. 1892, ch. 688, § 48), avoiding a judgment suffered by an officer of an insolvent corporation with intent to prefer a creditor, it appears, both from the testimony of the creditor and that of the bookkeeper of the corporation, with its books before him, that, although the creditor had been for a year or more in the invariable habit of selling goods to the corporation on a credit of from two to four months, he sold it goods, as testified to by him and by the president of the corporation, upon the terms of immediate payment, five days before the corporation admitted its insolvency by its petition in the proceedings for a voluntary dissolution, and that, four days thereafter, he recovered, by the consent of the president, and under direction of the attorneys of the corporation in the dissolution proceedings, the judgment in question, a finding by the trial court that the purchase price of the goods was not due when the action was brought, and that both the creditor and the president knew it, should be sustained, and, with other facts in the case, justifies the inference that the judgment was suffered by the president "with the intent of giving a preference over other creditors," and where a reversal by the Appellate Division of said finding and the judgment in favor of plaintiff is not stated to have been made upon the facts, it must be presumed to have been upon the law, and, there being sufficient evidence to sustain the finding, the Court of Appeals may reverse the judgment as founded upon an error of law. *Spellman v. Looschen*. 286

See BONDS, 1-3, 5; CONSTITUTIONAL LAW, 1, 2, 5, 9, 10; CONTRACT, 3.

CORROBORATION.

See EVIDENCE, 6, 13.

COUNSEL.

See APPEAL, 23.

COUNTERCLAIM.

See LANDLORD AND TENANT, 6.

COUNTIES.

1. *Liability for Acts of Officials in Maintaining a Nuisance.* A county which owns and maintains, for public purposes, a penitentiary, almshouse and farm used therewith, acts in a governmental capacity and is not liable for the acts of the officials controlling them, in permitting sewage and night soil from the buildings to be spread over the farm, thereby creating and continuing a nuisance to the damage of the land and stock of a neighboring owner, and he cannot maintain an action against the county for an injunction restraining such nuisance and for damages caused thereby. *Lefrois v. County of Monroe*. 563

2. *Remedy.* It seems, that the remedy of the neighboring owner is to proceed against the board of supervisors and the officers in control of the penitentiary and almshouse to have a continuance of the nuisance enjoined. *Id.*

COURT OF APPEALS.

See APPEAL, 1, 4-8, 12, 13, 14, 16, 17, 21, 22; CONSTITUTIONAL LAW, 4; CORPORATIONS; LIBEL, 1, 4; RAILROADS, 8, 9; RECEIVERS, 1.

COURTS.

1. *Final Decree for Alimony in Another State against a Resident of this State — Jurisdiction Acquired by General Appearance.* A court of another state which, by the law of that state, has power to amend a decree of

COURTS — Continued.

divorce previously rendered therein against a resident of this state, by the insertion of provisions for alimony alleged to have been inadvertently omitted therefrom, acquires jurisdiction to render a final decree for the payment of alimony, against him, upon a motion for such amendment, where he was personally served in this state with notice thereof, and he made a general appearance and contested it, although the decree of divorce was invalid as to him because rendered without jurisdiction.
Lynde v. Lynde. 405

2. *Constitutional Law — Enforcement of Foreign Decree.* In an action here upon such a decree, the provision of the Federal Constitution that full faith and credit shall be given in each state to the judicial proceedings of every other state (U. S. Const. art. 4, § 1), requires the courts of this state to give it full credit and effect as a judicial debt of record against the defendant for the amount fixed at the time of its rendition, but the law of this state does not permit the plaintiff, in aid of a judgment recovered upon the decree, to invoke the equitable remedies provided by the Code of Civil Procedure for the enforcement of a decree for alimony, inasmuch as they are available only in aid of decrees of divorce rendered in this state. *Id.*

3. *Provision for the Payment of Future Alimony.* A provision in such foreign decree for the payment of alimony in the future, however, remaining subject to the discretion of the foreign court, lacks that conclusiveness which requires the courts of this state to enforce it, inasmuch as the provision of the Federal Constitution referred to should be deemed to relate to judgments or decrees which not only are conclusive in the jurisdiction where rendered, but which are final in their nature. *Id.*

4. *Equitable Remedies not Enforceable in this State.* Provisions in such decree for methods to enforce payment, and a subsequent order which sought to carry it into effect by the equitable remedies of a receivership and injunction, cannot be enforced in this state, because they are in the nature of execution and operative upon the defendant only as he or property belonging to him may be found within the jurisdiction of the foreign court. *Id.*

See FRAUD.

CREDIBILITY.

See WITNESS, 1, 2.

CRIMES.

1. *Murder — Right to Trial by Common-law Jury — Statutory Regulations — Excluding Competent Persons from Jury List.* The accused is not denied his constitutional right to a trial by a common-law jury of twelve men merely because he is driven to the choice of his jurors from the general panel after the exclusion therefrom of competent persons, by reason of the fact that the commissioner of jurors has taken therefrom 2,500 men of presumably superior intelligence for a special jury list.
People v. Meyer. 357

2. *Evidence — Admissibility of Confessions — Decided as Matter of Law.* The admissibility in evidence of confessions may be decided by the trial court as a matter of law without submitting it to the jury, where there is absolutely no doubt on the question, though in other cases it is a question of fact to be decided by the jury under proper instructions. *Id.*

3. *Voluntary Character of Confessions — Fear or Duress.* Confessions may be held by the trial court as matter of law to have been voluntarily given, when there is nothing in the evidence, except the defendant's arrest and the fact that he was subjected to some physical violence at the hands of bystanders when he was being conveyed to the police station, that would furnish even a pretext for the claim that his confessions were not voluntarily made. *Id.*

CRIMES — *Continued.*

4. *Appeal — Error when not Prejudicial.* A judgment of conviction will be upheld even though it be assumed that a technical error was committed by the trial court in withholding from the consideration of the jury the question whether defendant's confessions were voluntary or not, when, under the circumstances of the case, the rulings of the court upon the confessions were not material because there was ample evidence outside of the confessions to sustain the verdict. *Id.*

5. *Arson — Evidence.* The evidence in a case of arson examined and held that it tended to support a finding that the fire was of incendiary origin. *People v. Smith.* 520

6. *Witness — Corroboration.* Where, upon a trial for arson, the theory of the prosecution is that the fire was the result of a family conspiracy to burn buildings and defraud insurers, and evidence is given that they removed articles of personal property before the fire and subsequently included them in the proofs of loss, the testimony of a principal female witness for the prosecution as to the identity of such articles cannot be corroborated by another witness' statement that she pointed them out to him as being the same as those mentioned in the proofs of loss, or, in effect, that she told him the same story out of court that she subsequently testified to on the trial. *Id.*

7. *Evidence — Improper Assumption of Existence of Conspiracy.* Upon such a trial the court cannot properly allude to a prior trial and conviction for the same offense of one of the alleged conspirators and assume the existence of a conspiracy for the purpose of admitting evidence of the acts and declarations of another alleged conspirator in the absence of defendant, and the reception of such evidence is reversible error. *Id.*

8. *Irrelevancy of Evidence as to Failure to Pay Promised Wages.* A witness for the prosecution, a former servant of the family, who has given important testimony as to the articles mentioned in the proofs of loss, but not destroyed by the fire, cannot be permitted to testify that he was not paid by them his agreed wages, as such evidence might be grouped with other evidence in the case tending to disparage the methods and moral character of the family, and its reception is prejudicial error. *Id.*

9. *Instruction as to Hypothesis of Guilt — Improper Qualification of Requested Charge.* The refusal to grant a requested charge that the evidence, in order to convict, must be so strong as to remove every other hypothesis than that of the defendant's guilt, followed by a charge that "it must be sufficient to remove every reasonable hypothesis," is error, because the jury may have understood that the evidence need not be so strong as to remove to a moral certainty every other hypothesis than that of the defendant's guilt or every reasonable hypothesis of his innocence. *Id.*

10. *Improper Statement of District Attorney.* A statement by the district attorney in his opening that he would show, if permitted, that several other buildings owned by the mother and family of the defendant and other buildings which he had assisted in erecting or was interested in were destroyed in a similar manner, with an incomplete statement as to what had happened within less than a year before the fire, which he refrained from finishing after an objection was taken but overruled by the court, constitutes prejudicial error, since the jury, after the court overruled the objection, may have understood that the district attorney was speaking within proper limits and may have inferred that they were dealing with an old offender. *Id.*

11. *Qualification of Trial Juror — Preformed Opinion — Code Crim. Pro. § 376.* The testimony of a juror on his examination, that he has formed an opinion that the accused is guilty from the fact that he was removed from his church by the bishop, and that he would naturally be influenced by the action of the bishop, constitutes *prima facie* a disqualification, which must be removed in the method provided by section

CRIMES — Continued.

376 of the Code of Criminal Procedure, by his declaration on oath "that he believes that such opinion or impression will not influence his verdict, and that he can render an impartial verdict according to the evidence,"
People v. Flaherty. 582

12. *Insufficient Declaration of Juror.* A juror's declaration on oath that he could render a fair and impartial verdict upon the evidence brought out on the trial, does not remove a *prima facie* disqualification arising from his testifying that he has an opinion as to the guilt or innocence of the accused, where he does not declare on oath, as required by the statute, "that he believes that such opinion or impression will not influence his verdict."
Id.

13. *Proving Distinct Offenses under Indictment for Rape — Authorizing Election at Close of Case for Prosecution.* Permitting the prosecution to prove seven distinct acts of intercourse under an indictment charging defendant with the crime of sexual intercourse with a female, not his wife, under the age of sixteen years, on a date named, and authorizing it, after all its evidence from many witnesses has been concluded, to elect which one of the seven crimes attempted to be proved should be treated as the particular crime charged in the indictment, is such a violation of the legal rights of the defendant as calls for the reversal of a judgment of conviction.
Id.

14. *Instruction to Jury — As to Matters not Sustained by Evidence.* An instruction to the jury permitting them seriously to weigh speculations of the prosecution as to the alteration of a document by the defendant is error when the tendency of such evidence as there was on the subject was, not only to establish that he did not make the alteration, but further that he did not have the opportunity to make it.
Id.

15. *Evidence — When Declarations of Reasons for Consent and for Silence in Case of Rape are Inadmissible.* Declarations as to the reasons for consent to sexual intercourse and for silence, made many months afterwards by a female under sixteen years of age, on whom the crime of rape was alleged to have been committed, are not admissible for any purpose against the defendant; and they are not made so by the fact that hearsay declarations by her as to the name of the guilty person may have been drawn out by him instead of by the prosecution.
Id.

See APPEAL, 23; EVIDENCE, 6.

DAMAGES.

See COUNTIES, 1; EQUITY; EVIDENCE, 5; FLATBUSH (TOWN OF), 2; LIBEL, 9, 11; RAILROADS, 2, 4, 5.

DECLARATIONS.

See EVIDENCE, 16.

DEED.

See VENDOR AND PURCHASER, 2, 3.

DEGREE OF CARE.

See NEGLIGENCE, 6, 15

DISCRETIONARY ORDER.

See APPEAL, 7; PRINCIPAL AND SURETY, 2.

DISMISSAL OF COMPLAINT.

See APPEAL, 10.

DISSOLUTION.

See PARTNERSHIP.

DIVORCE.

See COURTS, 1, 2; HUSBAND AND WIFE, 4.

DOWER.

See EVIDENCE, 2.

DURESS.

See CRIMES, 3.

EASEMENTS.

See RAILROADS, 3.

EJECTMENT.

See INDIANS, 1; TAX, 4.

ELEVATED RAILROADS.

See RAILROADS, 8-10.

EQUITABLE LIEN.

See BANKING, 1-3.

EQUITABLE REMEDIES.

See CONSTITUTIONAL LAW, 6-8.

EQUITY.

Award of Nominal Damages Does not Preclude Injunction against Diversion of Stream. The fact that only nominal damages have been awarded to a lower, for the unlawful diversion of a stream by an upper, riparian proprietor, does not preclude a court of equity from forever enjoining the latter from continuing the diversion and compelling him forthwith to restore the stream to its natural course and level, as equity will enjoin an act whose repetition or continuance may become the foundation or evidence of an adverse right, although no damage be shown or found. *Amsterdam Knitting Co. v. Dean.* 278

ESTATE

See TAX, 1.

ESTOPPEL

Insurance against Liability to Employees — Effect of Judgment against Employer. An insurance company which, by its contract, has agreed to defend actions against an employer for injury to employees, and which has conducted the defense in such a case down to the eve of trial, and has then withdrawn, leaving the employer no reasonable opportunity to prepare a defense in the action, is estopped from claiming that a judgment by default against the employer conclusively establishes the latter's negligence or violation of the Factory Law, which the insurance company sets up as a defense. *Glens Falls P. C. Co. v. Travelers' Ins. Co.* 399

See CARRIERS, 2; EXCISE, 3.

EVIDENCE.

1. *Libel — Publication by Others.* In an action for libel, the fact, unknown to the defendant when the publication complained of was made, that others have published the same libel, or that suits have been commenced against others for the publication of such libel, is inadmissible in evidence, nor is it admissible because elicited on an improper cross-examination of plaintiff with reference to a letter written by him referring to the publication by others, which had been introduced by defendant as a part of a correspondence between plaintiff and defendant, and which correspondence had been previously introduced in part by plaintiff. *Palmer v. Matthews.* 100

2. *Marriage — Dower.* In an action for the admeasurement of dower, in the absence of proof that a husband did not know his first wife was living when he married a second time, that fact will not be presumed upon the ground that otherwise he would be guilty of crime, when, if such presumption were to obtain, he would be guilty of crime in contracting a third marriage. *Palmer v. Palmer.* 190

EVIDENCE — Continued.

8. *Conflicting Presumptions.* When there are conflicting presumptions of unequal weight, the stronger will prevail, and the presumption which has the least probability to sustain it must yield to the more probable one. *Id.*

4. *Negligence.* In an action for personal injuries evidence of the omission to sound the gong upon a street car at a crossing, although not the cause of the plaintiff's injury, may be admissible as a part of the history of the transaction, as bearing upon the degree of care exercised by the defendant's employees and upon the question of contributory negligence. *Kleiner v. Third Ave. R. R. Co.* 198

5. *Pleading and Proof — Evidence as to Special Damages.* The averment in a complaint in an action for personal injuries that plaintiff sustained a severe nervous shock is insufficient to justify her in proving that the result of that shock was to produce heart disease, vertigo, curvature of the spine and other diseases, it not appearing that such consequences necessarily and immediately resulted from the shock, as the rule is that special damages must be specially alleged, and the reception of evidence of such resultant injuries, properly excepted to, is reversible error. *Id.*

6. *Rape — Corroboration.* The testimony of a female that defendant had committed rape upon her is not corroborated within the meaning of the statute (Penal Code, § 283), by evidence that defendant did not deny her declaration, made out of court, charging him with the crime, when repeated to him by a witness; nor is his admission to another witness that he had "insulted the girl" corroborative evidence when it does not appear when, where or how the insult was given. *People v. Page.* 272

7. *Question of Law.* Whether there is any evidence of corroboration is a question of law for the court, and it is error to submit such question to the jury. *Id.*

8. *Action for Broker's Commissions — Evidence Precluding Nonsuit.* Proof that the defendant, a lawyer, admitted to the plaintiff, a broker, that he considered the plaintiff to be the "procuring cause" of the sale of defendant's real estate, is evidence supporting the plaintiff's cause of action, and a judgment entered upon a nonsuit in an action brought by the broker to recover commissions must be reversed. *Ware v. Dos Passos.* 281

9. *Admissibility of Judgment after Reversal in Part.* A judgment setting aside a transfer by an insolvent as in fraud of creditors after it has been reversed as to the transferees, but affirmed as to the debtor, is entirely incompetent as against the transferees on a second trial to prove any want of good faith or inadequacy of consideration on their part, or to displace the burden of proof which rested on the plaintiffs in attacking the transfer. *Commercial Bank v. Sherwood.* 310

10. *Admissibility of Judgment after Reversal.* A judgment establishing fraud as to creditors, in a transfer of money from husband to wife and deposited by her in a bank, is not evidence of the fraud as against the bank on a second trial after reversal of the judgment on the bank's appeal although the wife failed to appeal. *Albro Co. v. Fountain.* 498

11. *Evidence of Fraud as to Creditors — Sufficiency to Support Judgment.* A judgment finding that money deposited by a wife in a bank was transferred to her by her husband in fraud of his creditors is not sustained by a suspicion of fraud growing out of the marriage relation and evidence that shortly before she deposited the money her husband had sold some property, for which he received a somewhat larger sum, and by the fact that on supplementary proceedings she first testified that she owned all the money and on a later date testified that part of the fund belonged to a third person, who, on a still different date, testified that he had no interest in it, since her testimony, though suspicious, was

EVIDENCE — *Continued.*

not necessarily in conflict, because the rights in the fund might have changed between the different dates. *Id.*

12. *Arson.* The evidence in a case of arson examined and held that it tended to support a finding that the fire was of incendiary origin. *People v. Smith.* 520

13. *Witness — Corroboration.* Where, upon a trial for arson, the theory of the prosecution is that the fire was the result of a family conspiracy to burn buildings and defraud insurers, and evidence is given that they removed articles of personal property before the fire and subsequently included them in the proofs of loss, the testimony of a principal female witness for the prosecution as to the identity of such articles cannot be corroborated by another witness' statement that she pointed them out to him as being the same as those mentioned in the proofs of loss, or, in effect, that she told him the same story out of court that she subsequently testified to on the trial. *Id.*

14. *Improper Assumption of Existence of Conspiracy.* Upon such a trial the court cannot properly allude to a prior trial and conviction for the same offense of one of the alleged conspirators and assume the existence of a conspiracy for the purpose of admitting evidence of the acts and declarations of another alleged conspirator in the absence of defendant, and the reception of such evidence is reversible error. *Id.*

15. *Irrelevancy of Evidence as to Failure to Pay Promised Wages.* A witness for the prosecution, a former servant of the family, who has given important testimony as to the articles mentioned in the proofs of loss, but not destroyed by the fire, cannot be permitted to testify that he was not paid by them his agreed wages, as such evidence might be grouped with other evidence in the case tending to disparage the methods and moral character of the family, and its reception is prejudicial error. *Id.*

16. *When Declarations of Reasons for Consent and for Silence in Case of Rape are Inadmissible.* Declarations as to the reasons for consent to sexual intercourse and for silence, made many months afterwards by a female under sixteen years of age, on whom the crime of rape was alleged to have been committed, are not admissible for any purpose against the defendant; and they are not made so by the fact that hearsay declarations by her as to the name of the guilty person may have been drawn out by him instead of by the prosecution. *People v. Flaherty.* 532

See APPEAL, 1, 4, 9; CRIMES, 2-4; LIBEL, 3, 5, 6, 11.

EXCEPTIONS.

See APPEAL, 2-4, 10-13.

EXCISE.

1. *Liquor Tax Law — Disposition of Revenue — Poor Fund.* The requirement of chapter 125 of the Laws of 1898 (a local statute for the benefit of the poor of the town of Plattsburgh), that "all" excise money arising from licenses granted in such town shall be deposited with the treasurer of the poor fund, is limited to the two-thirds which the Liquor Tax Law apportions to the town, and does not embrace the one-third which, by the terms of that law, is required to be paid to the state. *People ex rel. Town of Plattsburgh v. Williams.* 240

2. *Liquor Tax Certificate not a Chattel — Assignment thereof need not be Filed as a Chattel Mortgage.* A liquor tax certificate issued under the Liquor Tax Law (L. 1896, ch. 112) is personal property, but it is not a chattel within the purview of the Chattel Mortgage Act (1 R. S. [9th ed.] 2013), and a transfer thereof as security for a loan is valid as against a subsequent judgment creditor of the assignor, although not filed as a chattel mortgage. *Niles v. Mathua.* 546

3. *Estoppel.* An assignee of a liquor tax certificate, who allows it to remain in the hands of the assignor, is not thereby estopped from setting

EXCISE — Continued.

up title thereto as against a subsequent judgment creditor of the assignor; and, although such creditor is entitled to reach, through a receiver in supplementary proceedings, the assignor's interest in such certificate, subject to the provisions of the Liquor Tax Law, he stands in no different or better position than if he were a subsequent assignee of the certificate as security for his debt. *Id.*

EXECUTORS.

See SPECIFIC PERFORMANCE, 3.

EXECUTORS AND ADMINISTRATORS.

1. *Power of Surrogate to Deny Commissions.* A surrogate may, in his discretion, upon the settlement of an executor's accounts, deny him the statutory commissions if he has been guilty of misconduct, as the language of section 2730 of the Code of Civil Procedure, providing that on the settlement of the account of an executor or administrator, the surrogate "must allow to him for his services" the commissions fixed by law, is not necessarily exclusive of all discretion in the surrogate, and its exercise should be left to him upon the facts. *Matter of Rutledge.* 31

2. *Foreign Executors — Power to Sue in this State.* An executor appointed in Louisiana under Louisiana Revised Code (arts. 1220, 1668), for the professed purpose of carrying into effect on property in that state a will made in another state, does not, by virtue of such appointment, become entitled to sue as such executor in the state of New York. *Taylor v. Syme.* 513

FACTORY LAW.

1. *Factory Law Construed.* The manifest purpose of the Factory Law (L. 1886, ch. 409, as amd. by L. 1892, ch. 673) was to give more force to the existing rule that masters should afford a reasonably safe place for their servants to work; not that every piece of machinery should be covered or guarded, but that those parts of the machinery which are dangerous to the servants whose duty requires them to work in its immediate vicinity should be properly guarded; nor does the statute attempt to specify how machinery shall be guarded otherwise than as "properly guarded," which in each case is a question of fact depending upon the situation, nature and dangerous character of the machinery. *Glens Falls P. C. Co. v. Travelers' Ins. Co.* 399

2. *Violation of Factory Law a Question of Fact.* A setscrew projecting about five-eighths of an inch from a collar at one end of a revolving shaft which is from fifteen to eighteen feet above the floor of a factory, out of reach of employees engaged in operating the machinery, and reached only by a ladder, by which it is approached only for the purpose of oiling the bearing, does not, as matter of law, violate the Factory Law, but the necessity for a guard in such a case is a question of fact. *Id.*

3. *Insurance against Liability to Employees — Effect of Judgment against Employer.* An insurance company which, by its contract, has agreed to defend actions against an employer for injury to employees, and which has conducted the defense in such a case down to the eve of trial, and has then withdrawn, leaving the employer no reasonable opportunity to prepare a defense in the action, is estopped from claiming that a judgment by default against the employer conclusively establishes the latter's negligence or violation of the Factory Law, which the insurance company sets up as a defense. *Id.*

See ESTOPPEL.

FEDERAL CONSTITUTION.

See CONSTITUTIONAL LAW, 6-8.

FINAL JUDGMENT.

See APPEAL, 21.

FINAL ORDER.

See APPEAL, 18, 19, 21.

FIRE INSURANCE.

See INSURANCE, 1-4, 3, 10.

FIXTURES.

See LANDLORD AND TENANT, 1.

FLATBUSH (TOWN OF).

1. *Parties.* The town of Flatbush, by chapter 356 of the Laws of 1894, having been merged in the city of Brooklyn, the city is a proper party defendant to any action which might have been brought against the town before the merger. *Huffmire v. City of Brooklyn.* 584

2. *Liability for Destruction of Oyster Bed by the Discharge of Sewage Thereon.* A right to plant an oyster bed under public waters within the town of Flatlands, and gather oysters therefrom, acquired under the statute (L. 1868, ch. 734), is private property and the destruction of the bed by sewage discharged thereon from a sewer of a town is a direct invasion of a private right and taking of private property within the meaning of the Constitution, although the sewer was constructed by the town under legislative authority (L. 1889, ch. 161); and the city of Brooklyn, having succeeded to the property and liabilities of the town, is liable in an action for damages for such injury. *Id.*

FOREIGN DECREE.

See CONSTITUTIONAL LAW, 6-8.

FOREIGN RECEIVER.

See RECEIVERS, 1.

FRANCHISE.

See SOUTHAMPTON (TOWN OF), 1.

FRAUD.

Body Acting Judicially. A court or body acting judicially may commit an error or exceed jurisdiction, but it cannot be guilty of fraud in the proper or legal sense of the term. *Brennan v. City of Buffalo.* 491

See APPEAL, 20; EVIDENCE, 9-11.

FRAUDULENT CONVEYANCE.

Transfer in Fraud of Creditors—Validity as to One of Two Transferees. A transfer of property by an insolvent to two of his creditors, in payment of a distinct indebtedness owing to each, gives each of them an undivided one-half interest in the property, and may be sustained as to one of them, although the transfer as to the other is invalid as in fraud of creditors. *Commercial Bank v. Sherwood.* 310

GUARANTY.

Guaranty of Royalties—Construed with Main Contract. A guaranty of the payment of the "royalty of \$30 per week only" secured to an inventor for a term of years by a certain agreement entitling him to a royalty from a licensee that is guaranteed to amount to at least \$2,000 per year and to advances of \$30 per week on account of said royalty, and by the terms of which he agrees to devote his time and attention to the best of his ability to the business of the licensee as superintendent of construction and salesman, "if requested so to do" by the licensee, though the guaranty also says that it shall run only so long as the license remains uncanceled and the inventor "shall continue as salesman and superintendent of construction * * * and render such services as provided in said contract," binds the guarantor to the payment of all such weekly royalties as may become due under the main contract, and remains in force notwithstanding the inventor's discharge from his position as superintendent and salesman, where the license was not canceled and he continues to be willing to render his services if requested. *Creamer v. Mitchell.* 477

HABEAS CORPUS.

Liability of Sheriff for Discharge of Civil Debtor from Imprisonment — Code Civ. Pro. § 2038, Subd. 1. A county judge has no power, upon the return to a writ of habeas corpus, to order the discharge of an executrix, committed to jail for a civil contempt in failing to pay certain sums of money to persons named in a surrogate's decree, where no notice has been given to the persons who have an interest in continuing the imprisonment or restraint, or to their attorney; such an order is void under subdivision 1 of section 2038 of the Code of Civil Procedure, and affords no protection to a sheriff, in a proceeding to punish him for a civil contempt in releasing her from custody, because made by an officer of limited statutory jurisdiction without taking the necessary jurisdictional steps, if the order contains no recital of jurisdictional facts and the sheriff cannot prove such facts by extrinsic evidence. *Matter of Leggat.* 437

HOLIDAYS.

See LANDLORD AND TENANT, 5.

HUSBAND AND WIFE.

1. *Ante nuptial Settlement — Property Covered.* Property coming to the wife after the husband's death is not subject to the trust created by an ante-nuptial settlement which purports to cover all property which she may "hereafter" acquire, notwithstanding that the wife is authorized to make appointment in favor of the issue of the contemplated marriage or of any "subsequent" one, and contains a covenant by the husband to settle under the trust any property which may accrue to the wife "during her lifetime." *Borland v. Welch.* 104

2. *Covenant to Settle Subsequently-acquired Property of Wife.* A marriage covenant for the settlement of subsequently-acquired property upon trustees will, in the absence of any expression showing that it was intended to have a more extended operation, be so construed as to limit it to property acquired during the intended coverture, since its primary object is to prevent the property from falling under the sole control of the husband. *Id.*

3. *Ante-nuptial Settlement — Enforcement by Collaterals of Wife.* The provision in a marriage settlement that the property of the wife shall descend to her right heirs at law and next of kin in default of the exercise of a power of appointment reserved to her, is not, so far as concerns property acquired after the termination of her coverture, enforceable, by the trustee named in the settlement, for the benefit of collateral relatives of the wife, the latter having died without issue, but leaving a will disposing of the property, since her agreement is a voluntary executory agreement as to such property and was not made for the benefit of the collaterals who are volunteers. *Id.*

4. *Trust — Income Devoted to Support of Wife of Beneficiary — Effect of Divorce and Second Marriage.* The income of a trust fund created by will for the benefit of testator's son cannot be devoted to the support of his wife, under a decree for alimony, after an absolute divorce in her favor, when she marries again and her husband's ability to support her is unquestionable. *Wetmore v. Wetmore.* 503

IDENTIFICATION.

See SPECIFIC PERFORMANCE, 1, 2.

INCORPORATION.

See WILL, 3.

INDIANS.

1. *Ejectment — Not Maintainable by Member of Montauk Tribe of Indians, Suing for All who may Contribute.* A member of the Montauk Tribe of Indians cannot maintain an action of ejectment on behalf of himself and all other persons equally interested with him, who may come in and contribute to the expenses of the action, as such tribe has no statutory

INDIANS — *Continued.*

right or capacity to bring such an action, and no corporate name by which it can institute it, and, therefore, no one member can sue for the benefit of all, since the cause of action does not exist. *Johnson v. Long Island R. R. Co.* 462

2. *Remedy is by Enabling Act.* The tribe is not without legal redress, as by an application to the legislature an enabling act can be obtained allowing action to be brought in the name of its chief or head, or of such member or members thereof as may be selected. *Id.*

INFANTS.

See VENDOR AND PURCHASER, 4.

INJUNCTION.

See COUNTIES, 1, 2; EQUITY.

INSOLVENCY.

See EVIDENCE, 9; FRAUDULENT CONVEYANCE; RECEIVERS, 1, 2.

INSURANCE.

1. *Fire Insurance — Oral Contract for Insurance has Legal Effect of Standard Policy.* Where a local agent of a fire insurance company, after a conversation with an applicant for insurance, in which the sum for which the property was to be insured, the premium and period of insurance were discussed and fixed, stated to applicant that "You are insured from noon on the 30th day of December, 1893, to noon of December 30th, 1894," a complete and binding agreement for insurance for the period named is created, and the law reads into the contract the standard fire insurance policy of the state of New York, whether it was referred to in terms or not. *Hicks v. Br. Am. Assur. Co.* 284

2. *Proofs of Loss must be Served under such Contract.* In an action brought upon such contract to recover for damages caused by fire, the plaintiff must, after proving the contract and loss by fire, show compliance with the requirements of the standard policy and prove service of proofs of loss or a waiver thereof by the defendant; and the charge of the trial court that, as matter of law, it was not necessary for the plaintiff to present to the defendant such proofs of loss, is an error of law for which a judgment for the plaintiff must be reversed. *Id.*

3. *Failure to Deliver Policy — Not Ground for Recovery.* Where such action has been brought, tried and decided upon the theory that such contract was a completed contract for present insurance, a judgment for plaintiff cannot be affirmed upon the ground that plaintiff sustained damages because defendant had failed to deliver to plaintiff written evidence of the contract, *i. e.*, a policy of insurance, and that, therefore, it was unnecessary for plaintiff to give notice of the fire and present proofs of loss, as required by the standard policy. *Id.*

4. *Proofs of Loss not Waived by Acts of Agent or Denials in Answer.* An implied waiver of the service of proofs of loss cannot be inferred from the failure of the local agent to deliver the policy, or from his testimony on the trial denying that he ever made a contract to insure the premises; nor does the insurer's denial, by its answer, of the allegations of the complaint constitute a waiver, the insured having made no claim prior to the commencement of the action that the building was insured by the defendant. *Id.*

5. *Insurance Law — Loan below Statutory Standard Made by a Domestic Insurance Company not a Defense to Mortgagor.* An offer of a mortgagor to prove, under his answer in foreclosure, that at the time the mortgagee, a domestic insurance company, made him the loan on his premises they were incumbered and were not worth fifty per centum more than the loan, presents no defense to the action, although the Insurance Law (L. 1892, ch. 690, § 13, amd. L. 1893, ch. 112, amd. L. 1893, ch. 723, § 16,) in the interest of policyholders, prescribes that standard for such

INSURANCE — *Continued.*

loans, as the statute does not expressly prohibit such a corporation from investing in anything except insurance stocks; and no implication, that an investment below the standard is prohibited by the statute and is, therefore, void, should be imported to assist the borrower to escape payment. *Washington L. Ins. Co. v. Clason.* 805

6. *Fire Insurance — Oral Contract of Local Agents to Continue Risk and Renew it on Credit.* Where a member of a firm of local fire insurance agents, authorized to countersign, issue and renew policies, agrees orally to continue an existing contract of insurance and issue a renewal or policy therefor, the insurer is bound although credit was given for the renewal premium. *Squier v. Hanover F. Ins. Co.* 552

7. *Witness — Credibility.* Where the insurer and its agents assume the position that the policy in suit had lapsed before the loss occurred, the insured may, for the purpose of attacking the credibility of the agents sworn upon the trial, ask them on cross-examination whether they have not stated, in substance, to third parties that they thought the loss would be adjusted and paid and that the insured would not lose the amount, and, in case of their denial, the insured may show that they had made such statements. *Id.*

8. *Life Insurance — Ambiguous Policy Construed most Strongly against Insurer.* Where the language of an insurance contract is so ambiguous as to render it susceptible of two interpretations it should be construed most strongly against the insurer, because the latter has prepared the contract and is responsible for the language used. *Janneck v. Metropolitan L. Ins. Co.* 574

9. *Construction of Ambiguous Clause as to Right to Terminate Contract.* A stipulation contained in a policy issued by a life insurance company to the effect that "Should the life insured * * * become so intemperate as to impair his health, * * * said company shall have the unquestioned right, upon becoming satisfied of such fact, to terminate this contract immediately upon the tender to the party in interest of the legal reserve, as hereinbefore described" makes the insurer's right to terminate the contract dependent upon the existence of the fact which is relied upon to terminate it, and gives the insurer no arbitrary right to terminate merely because it has itself become satisfied of the fact. *Id.*

10. *Fire Insurance — Waiver of Service of Proofs of Loss.* An agent of a fire insurance company, authorized to adjust the amount of a loss and empowered to negotiate any settlement of the claim of the insured and to pay and discharge it, is, under such circumstances, a general agent, and his waiver of service of proofs of loss will bind the company, although such waiver was not indorsed upon the policy as therein required. *Smaldone v. Pres., etc., Ins. Co. of No. America.* 580

See ESTOPPEL.

INTEREST.

1. *Market Value.* In an action to recover unliquidated damages for the breach of an executory contract to convey property, interest is not allowable unless there is an established market value of the property or means accessible to the party sought to be charged of ascertaining by computation or otherwise the amount to which the plaintiff is entitled. *Sloan v. Baird.* 327

2. *Partnership — Right to Interest upon Advances by Partner to Firm.* A partner is entitled to interest upon advances of money made to the firm without any express agreement respecting interest, when those advances are in fact loans, with respect to which he is a creditor of the firm; but he is not entitled to interest on his contributions to the capital of the firm or additions thereto, unless there is a special agreement that he shall have interest thereon. *Rodgers v. Clement.* 422

INTEREST — *Continued.*

3. *Appeal — Presumption as to Finding of Referee.* A referee's finding that a partner is not entitled to interest "on his advances of money to and for the use of the firm," because there was no agreement for interest, cannot be sustained by virtue of a presumption that he found every fact necessary to support the judgment, and, therefore, must have found that the advances were not loans but contributions of capital, where the complaint alleges that the plaintiff loaned large sums of money to the firm, which have not been repaid, and the answer denies these allegations but admits that certain loans were made, and alleges a repayment thereof, without making any claim that the advances were capital. *Id.*

INTERLOCUTORY JUDGMENT.

See APPEAL, 13.

INTERSTATE COMMERCE.

See CONSTITUTIONAL LAW, 3.

JUDGMENT.

See APPEAL, 9, 10; CONSTITUTIONAL LAW, 6, 8; CORPORATIONS; EVIDENCE, 9-11.

JURISDICTION.

See COURTS, 1; FRAUD; LIMITATION OF ACTIONS, 1; SURREGATES; TAX, 6, 8.

JURORS.

See CRIMES, 11, 12.

JURY.

See CRIMES, 1; NEGLIGENCE, 10.

LANDLORD AND TENANT.

1. *Lease — Right to Remove Fixtures.* The right to remove fixtures by virtue of a parol contract subsequent to a lease is lost by failing to exercise it during the term and by entering into a new lease which does not preserve the right, but contains a covenant by the lessees to return the premises in as good a state as reasonable use and wear will permit, and a provision authorizing them to make such alterations as they deem necessary for their business, they agreeing to restore the premises to their present condition. *Stephens v. Ely.* 79

2. *Surrender by Operation of Law.* A surrender of leased premises is created by operation of law, although the landlord has declined an offer of surrender, where after the tenant has abandoned them the landlord lets them in his own name to a third person for a new term, without the tenant's consent. *Gray v. Kaufman D. & I. C. Co.* 398

3. *Assent by Silence.* A tenant's assent to a new letting of premises which he has abandoned will not be implied by his failure to answer a letter from the landlord, saying that he would relet them on the tenant's account, so as to prevent a surrender by operation of law if the landlord subsequently relets them. *Id.*

4. *Lease — Reduction of Rent Pro Tanto — Fortuitous Event Preventing use of Premises.* The inability of lessees to operate a plantation in Louisiana for the third year of their lease, on account of their financial failure and the fact that their creditors took possession of their movable property on the plantation, must be deemed to be the result of their own improvidence, and cannot be properly called a "fortuitous event" which will relieve them of the payment of rent *pro tanto* for the time they were deprived of the use of the premises, where the lease provides for such reduction for deprivation by a "fortuitous event," and the Civil Code of Louisiana defines this as "that which happens by a cause which we cannot resist." *Taylor v. Syme.* 513

LANDLORD AND TENANT — *Continued.*

5. *Rent Falling Due on Legal Holiday.* Rent becoming due on a legal holiday, other than Sunday, is payable on that day. *Walton v. Stafford.* 558

6. *Assignee for Benefit of Creditors — Rent — Use and Occupation — Counterclaim.* A general assignee of a tenant is not liable to the landlord for a monthly payment of rent which fell due on a secular legal holiday occurring on the day before the making of the assignment and the commencement of his occupation, nor for use and occupation where the lease has remained in effect during the entire period of his occupancy; and, therefore, neither the rent nor the value of the use and occupation can be offset by the landlord against a claim by the assignee for the price of chattels of the assignor sold by the assignee, during his occupation, to the landlord. *Id.*

LEASE.

See LANDLORD AND TENANT, 1-4; TRUSTS, 2.

LEGISLATURE.

See INDIANS, 2; WILL, 1.

LIBEL.

1. *Question of Insufficiency of Complaint Cannot be Raised for First Time on Appeal.* It seems, that a complaint which, after stating slanderous words alleged to have been spoken by the defendant in the presence of certain reporters, alleges that "thereby" the defendant caused such statements to be printed and published, and which contains no direct allegation that he caused them to be printed and published, does not allege a cause of action against him for libel; but as the question of its insufficiency was not presented by any proper objection or exception in the court below, it cannot be raised for the first time in the Court of Appeals. *Schoepflin v. Coffey.* 12

2. *Speaking Words which Another Publishes.* The mere speaking of words in the presence of third persons that are not actionable *per se* and which at most would amount to a mere slander, even if special damages were alleged, is not the proximate cause of an injury alleged to have been sustained by their subsequent publication in newspapers by such persons when he who utters them, in no manner procured, requested, commanded or induced their printing, and he cannot be made responsible therefor in an action for libel. *Id.*

3. *Evidence — Sufficiency to Show Connection with Publication of Libel.* Where the evidence in an action for libel, at most, only establishes that a person whom defendant knew to be a reporter asked him as to a report which was in circulation concerning the matters alleged in the complaint, stating that he understood that defendant had asserted the facts which were subsequently published, and the latter admitted having said so, there being no proof that the latter's statement was made for publication, nothing having been said on the subject, and there being other evidence tending to show that defendant did not intend that it should be published and had no design to procure its publication, the refusal of the trial court to grant a nonsuit or to direct a verdict for defendant is reversible error, upon the ground that the proof was insufficient to establish a cause of action against him for libel. *Id.*

4. *Record on Appeal.* The Court of Appeals is confined to and controlled by the record on appeal and cannot correct even an obvious error, contained in an exception appearing upon a record, which, if imperfect, should have been corrected by the appellant. *Id.*

5. *Sufficiency of Evidence.* A mere conjecture or suspicion that defendant in an action for libel communicated slanderous statements to another, for the purpose of their publication, is not enough to authorize the submission of the question as one of fact to a jury, since a mere scintilla of evidence is not sufficient. *Id.*

LIBEL—*Continued.*

6. *Evidence of Plaintiff's Consent to Publication of Libel.* Upon the trial of an action for libel, an exception by defendant to the striking out of evidence received without objection, that the alleged libelous articles were printed and published with plaintiff's consent, is well taken, as defendant was entitled to have it retained in the case and considered by the jury. *Id.*

7. *Cause of Action*—*Penal Code, § 254a.* An action framed as one for libel, but which cannot be maintained as such, cannot be sustained as an action under section 254a of the Penal Code, declaring that one who willfully makes to an employee of a publisher of a newspaper a statement concerning any person, which if published therein would be a libel, is guilty of a misdemeanor. *Id.*

8. *Article Reflecting on Physician Libelous per se.* An article in a Polish newspaper, concerning a physician and druggist largely patronized by Poles among whom the paper circulates, is libelous upon its face, where it refers to his profession and business, calls him a blockhead or fool, and appeals to the Poles not to trust themselves or their families to his professional care when he so hated them that he would not help them if he could. *Krug v. Pitase.* 154

9. *Punitive Damages—When not Recoverable.* Punitive damages cannot be recovered in an action for libel for general malice, but only for such particular malice as existed when the libel was published and which had some influence in causing its publication. *Id.*

10. *Malice of One, when not Imputable to Other Defendants.* In an action for libel against several defendants, the malice of one defendant cannot be imputed to the others without connecting proof. *Id.*

11. *Recovery of Punitive Damages against All for the General Malice of One of the Defendants.* Where, in an action against several defendants for libel, to recover damages for the publication of an article libelous *per se*, each of the defendants testifies that he had no malice or ill-will toward the plaintiff, and the latter, in order to show express malice, justifying a recovery of punitive damages, is permitted to prove as against all, that several years before the publication, one of them, who knew nothing about the article until after it had been published, had made statements expressing contempt and ill-will for the plaintiff, never heard by or communicated to the other defendants before the publication, a judgment recovered against all must be reversed, as the general malice proved neither caused nor prompted the publication of the libel, and has, as it must be presumed, entered into the verdict against all in violation of the rights of each. *Id.*

See EVIDENCE, 1.

LIEN.

See SPECIFIC PERFORMANCE, 2.

LIFE INSURANCE.

See INSURANCE, 8.

LIMITATION OF ACTIONS.

1. *Jurisdictional Defects Cured by Statute of Limitations.* The principle that jurisdictional defects are so vital in their character as to be beyond the help of retrospective legislation does not apply to a statute of limitations, for such a statute will bar any right, however high the source from which it may be deduced, provided that a reasonable time is given a party to enforce his right. *Meigs v. Roberts.* 371

2. *State Tax Sale*—*L. 1885, Ch. 448, Primarily a Statute of Limitation.* Chapter 448 of the Laws of 1885, amending Laws of 1855, chapter 427, section 65 (subsequently re-enacted in part in L. 1891, ch. 217; L. 1898, ch. 711), which makes the comptroller's conveyance executed upon a tax sale conclusive evidence, after the lapse of two years from its

LIMITATION OF ACTIONS — *Continued.*

record in the county in which the lands conveyed are located, of the regularity of the proceedings in which conveyance was made although in some aspects a curative statute, is, primarily and essentially, a statute of limitations. *Id.*

See TAX, 7.

LIQUOR TAX CERTIFICATE.

See EXCISE, 2, 3.

LIQUOR TAX LAW.

See EXCISE.

MALICE.

See LIBEL, 9-11.

MARRIAGE.

See EVIDENCE, 2.

MARRIAGE SETTLEMENT.

See HUSBAND AND WIFE, 1-3.

MARKETABLE TITLE.

See VENDOR AND PURCHASER, 4.

MARKET VALUE.

See INTEREST, 1.

MASTER AND SERVANT.

See FACTORY LAW, 1; NEGLIGENCE, 7.

MILEAGE BOOK ACTS.

See CONSTITUTIONAL LAW, 1-3, 5.

MONTAUK INDIANS.

See INDIANS.

MORTGAGE.

Insurance Law — Loan below Statutory Standard Made by a Domestic Insurance Company not a Defense to Mortgagor. An offer of a mortgagor to prove, under his answer in foreclosure, that at the time the mortgagee, a domestic insurance company, made him the loan on his premises they were incumbered and were not worth fifty per centum more than the loan, presents no defense to the action, although the Insurance Law (L. 1892, ch. 690, § 18, amd. L. 1893, ch. 112, amd. L. 1893, ch. 725, § 16), in the interest of policyholders, prescribes that standard for such loans, as the statute does not expressly prohibit such a corporation from investing in anything except insurance stocks; and no implication, that an investment below the standard is prohibited by the statute and is, therefore, void, should be imported to assist the borrower to escape payment. *Washington L. Ins. Co. v. Clason.* 305

See TRUSTS.

MUNICIPAL CORPORATIONS.

See TAX, 5-8.

MURDER.

See APPEAL, 23; CRIMES, 1-4.

NATIONAL BANKS.

See BANKING.

NEGLIGENCE.

1. *Contributory Negligence — Mistake of Judgment in Imminent Peril.* Upon the trial of an action against a railroad company for damages for the death of plaintiff's intestate occurring at one of its crossings, that deceased was in a position of imminent danger is not sufficiently estab-

NEGLIGENCE — *Continued.*

lished where the undisputed evidence shows that he was in good health, entirely familiar with the crossing, was driving a gentle horse at a walk, or slow trot, and saw the train by which he was struck approaching at a speed of from forty to fifty miles an hour when it was still two hundred feet from the crossing, and when the head of his horse was within six feet of the nearest rail, there being nothing in the surroundings to confuse him, and the circumstances indicating that he first intended to jump from the wagon and then changed his mind and whipped up his horse, intending to cross in front of the train; and a charge to the jury stating the legal principle applicable to a mistake of judgment, committed by one placed in such a position by the negligence of another, is reversible error, as it permits a finding that the deceased was free from contributory negligence, when the evidence does not. *Getman v. D., L. & W. R. R. Co.* 21

2. *Burden of Proof.* The burden is upon plaintiffs, in an action to recover for the negligent killing of their intestate, to show that the latter acted with reasonable care under the circumstances. *Id.*

3. *Action by Engineer of Railroad Train in an Emergency.* Where an excursion coach, moving at the rate of five to seven miles an hour, suddenly presents itself, at a railroad crossing, to the view of the engineer of a train four hundred feet from the crossing, and which is approaching at the rate of thirty-five miles an hour, and he has only about eight seconds to determine what he will do in the matter, it is erroneous for the trial court to charge, in an action brought by a person who was on the coach and was injured by the resulting collision, that if the engineer, after seeing the horses of the coach, omitted to do "any act" which might have prevented the collision or lessened the danger, the railroad corporation was guilty of negligence, as such instruction ignores the situation at the time of the accident, and permits the jury to find negligence without regard to the facts and circumstances, such as the short period of time in which he was obliged to act, the impending danger and consequent excitement, the various acts required to stop or lessen speed and all the other circumstances surrounding him. *Lewis v. L. I. R. R. Co.* 52

4. *Driving on Steam Railroad Track without Stopping.* It is proper for the trial court to refuse to charge, in such an action, that it is negligence as a matter of law to drive on a steam railroad track, at a point where the view is obstructed, without stopping, as the rule is that, while the traveler must listen and look, he is not required also to stop, and his omission to do so is a fact for the consideration of the jury. *Id.*

5. *Omission to Comply with Statute Relating to Sign Boards.* A railroad corporation is not entitled to a charge, in an action brought by one who was injured at a railroad crossing which he had never seen before, that no negligence can be imputed to the corporation by reason of the size or shape of the danger signal at the crossing, or the language of the warning to the public, or the length of its letters — these failing to comply with the Railroad Law (L. 1890, ch. 565, § 83) — as, in the case of one who is a stranger to the crossing, a failure in such respects might constitute actionable negligence, and justify a recovery when the injury was caused by a disregard of the statute. *Id.*

6. *Degree of Care Required at a Railroad Crossing.* A traveler, approaching a railroad crossing, is bound to exercise ordinary, but is not bound to exercise extraordinary, care to detect an approaching train. *Id.*

7. *Relation of Master and Servant.* The relation of master and servant, and the consequent responsibility of the former for the acts of the latter, does not exist between associates who have hired a coach and its driver, it appearing that they neither selected nor paid him, and, at most, had only a right to order him to go forward or stop. *Id.*

NEGLIGENCE—*Continued.*

8. *Evidence.* In an action for personal injuries evidence of the omission to sound the gong upon a street car at a crossing, although not the cause of the plaintiff's injury, may be admissible as a part of the history of the transaction, as bearing upon the degree of care exercised by the defendant's employees and upon the question of contributory negligence. *Kleiner v. Third Ave. R. R. Co.* 193

9. *Appeal—Evidence not Reviewable Notwithstanding Allowance of Appeal from Unanimous Decision.* The Court of Appeals cannot review the sufficiency of the evidence to sustain a verdict after a unanimous affirmation by the Appellate Division, in an action for personal injuries, notwithstanding the allowance of an appeal, but can consider only such questions of law as are raised by proper exceptions. *Id.*

10. *Trial—When Charge Does not Interfere with Province of Jury.* It is not error for the trial court to charge, in such an action, that if the jury believe that the accident happened in the manner described by the defendant's witnesses their verdict must be for the defendant, and if they believe it occurred in the manner described by the plaintiff and her witnesses, she is entitled to recover, since it leaves to the jury the determination of all the facts. *Id.*

11. *Pleading and Proof—Evidence as to Special Damages.* The averment in a complaint in an action for personal injuries that plaintiff sustained a severe nervous shock is insufficient to justify her in proving that the result of that shock was to produce heart disease, vertigo, curvature of the spine and other diseases, it not appearing that such consequences necessarily and immediately resulted from the shock, as the rule is that special damages must be specially alleged, and the reception of evidence of such resultant injuries, properly excepted to, is reversible error. *Id.*

12. *Contributory Negligence—When a Question of Law.* The question of contributory negligence is generally one of fact to be determined by the jury; and it is only where it clearly appears from the circumstances, or is proved by uncontroverted evidence, that the party injured has, by his own acts or neglect, contributed to the injury, that the court can determine that question. *Kettle v. Turl.* 255

13. *When a Question of Fact.* In an action for personal injuries alleged to have been caused by the negligence of defendants, in which it appeared that plaintiff was struck by the whiffletrees of defendants' passing truck, as he was mounting his own truck, which was standing close to the curb, on the right-hand side of a street sixty feet wide from curb to curb, the questions of defendants' negligence and plaintiff's freedom from contributory negligence, *held*, under the facts and circumstances of the case, to be questions of fact. *Id.*

14. *Question of Fact.* Where, in an action to recover damages for injuries sustained by a passenger in an open horse car which was struck at its rear by a cable car of another independent street railway whose line crossed the horse car line at right angles, there is no evidence of the relative position or speed of the cars as they approached the intersection, the negligence of both street railway corporations is a question for the jury; and a charge of the trial court that the accident raised a presumption of negligence, and that there was no testimony to overcome the presumption, is an error which is not cured by repeated instructions of the court that the burden of proof is on the plaintiff to establish each element of her case, including the negligence of both defendants. *Loudoun v. Eighth Ave. R. R. Co.* 380

15. *Res Ipsa Loquitur—Doctrine Applies to Carrying, but not to Colliding, Company.* The fact of the accident raises a presumption, under the doctrine of *res ipsa loquitur*, that the carrier of the passenger was negligent, for it was bound to exercise a very high degree of care, especially at an intersection with another road, but no such presumption

NEGLIGENCE—*Continued.*

arises against the other street railway, as it, not being the carrier, was bound to exercise only ordinary care under such circumstances. *Id.*

16. *Erroneous Charge that Accident was Unexplained.* It is erroneous for the trial court to charge as matter of law that no explanation of the accident, required of the carrier under the circumstances, had been given where the proof is that the cable car struck the horse car at its rear end, as how far that fact tended to show that the horse car had properly and carefully proceeded over the crossing and that the collision was not its fault, but was the fault of the other street railway, is a question of fact for the jury. *Id.*

See EVIDENCE, 4.

NEW TRIAL.

See APPEAL, 13, 17.

NEW YORK CITY.

See CONTRACT, 2; RAILROADS, 1-7.

NONSUIT.

See APPEAL, 14; EVIDENCE, 8.

NOTICE.

See BANKING, 1, 3, CRIMES, 1, 2; PARTNERSHIP.

NUISANCE.

See COUNTIES, 1, 2.

OFFICERS.

See COUNTIES, 1, 2.

OYSTERS.

See FLATBUSH (TOWN OF), 2.

PARTIES.

See FLATBUSH (TOWN OF), 1; INDIANS, 1; SPECIFIC PERFORMANCE, 3; WITNESS, 2.

PARTNERSHIP.

Notice of Dissolution. It is reversible error for the court in an action against the members of a partnership as makers by the transferee of a promissory note, to instruct the jury, in substance, that the plaintiff, in law, had been notified of the dissolution of the defendant firm where it appears that notice thereof had been communicated to two commercial agencies, that one or two newspapers in the vicinity had published a local item of the dissolution and that printed notices thereof had been sent out by the firm's corporate successor in its business letters; these facts are insufficient to charge the plaintiff, assumed to be a non-dealer with the firm, and thus only entitled to general notice, with notice of its dissolution, as to make a general notice legally effectual the only safe rule is that it be seasonably published in one or more of the newspapers in the immediate vicinity. *Citizens' Nat. Bank v. Weston.* 113

See INTEREST, 2, 3.

PENAL CODE.

1. § 254a—*Cause of Action.* An action framed as one for libel, but which cannot be maintained as such, cannot be sustained as an action under section 254a of the Penal Code, declaring that one who willfully makes to an employee of a publisher of a newspaper a statement concerning any person, which if published therein would be a libel, is guilty of a misdemeanor. *Schoepfin v. Coffey.* 12

2. § 283—*Evidence—Rape—Corroboration.* The testimony of a female that defendant had committed rape upon her is not corroborated within the meaning of the statute (Penal Code, § 283), by evidence that defend-

PENAL CODE — Continued.

ant did not deny her declaration, made out of court, charging him with the crime, when repeated to him by a witness; nor is his admission to another witness that he had "insulted the girl" corroborative evidence when it does not appear when, where or how the insult was given. *People v. Page.* 273

PERFORMANCE.

See CONTRACT, 4.

PERSONAL PROPERTY.

Tenancy in Common of Personal Property. Personal property, as well as real estate, is subject to the statutory rule (2 R. S. 727, § 44) that "every estate granted or devised to two or more persons in their own right shall be deemed a tenancy in common unless expressly declared to be in joint tenancy." *Commercial Bank v. Sherwood.* 810

See EXCISE, 2.

FLEADING.

See EVIDENCE, 5; LIBEL, 1.

POOR.

See CONSTITUTIONAL LAW, 9.

POOR FUND.

See EXCISE, 1.

POSTPONEMENT.

See BILLS, NOTES AND CHECKS, 6.

POWER OF SALE.

See SPECIFIC PERFORMANCE, 3.

PRACTICE.

See APPEAL, 8.

PREFERENCE.

See CORPORATIONS; SPECIFIC PERFORMANCE, 2.

PRESCRIPTION.

See RAILROADS, 3, 6.

PRESUMPTION.

See EVIDENCE, 3; NEGLIGENCE, 14, 15.

PRINCIPAL AND AGENT.

See INSURANCE, 6, 7, 10.

PRINCIPAL AND SURETY.

1. *Right of Surety Company to be Released under Section 812, Code of Civil Procedure — When not Waived.* Fidelity and surety companies, being authorized to contract as sureties upon official bonds under section 812 of the Code of Civil Procedure, are not excepted from the provisions thereof, authorizing "sureties upon certain official bonds to petition for release from liability" thereunder, and can avail themselves, in proper cases, of such remedies as the Code provides for sureties generally; and a surety company does not waive such rights by accepting a contract of indemnity which expressly provides that acceptance of security or consideration should not "limit or abridge any right or remedy which the surety otherwise might have." *Matter of Thurber.* 244

2. *Discretionary Power of Court.* The provision of section 812 of the Code of Civil Procedure, that the court "must issue an order" to the principal requiring him "to show cause" why he should not account and give new sureties, is not a mere substitute for a notice of motion, but is part of a special remedy and implies that cause may be shown. The court has a discretion to exercise depending on the facts in the case, and

PRINCIPAL AND SURETY — *Continued.*

is not commanded to make a decree requiring the principal to show cause regardless of those facts. The expression "a decree must be made" means, under the circumstances, "a decree may be made." *Id.*

PROMISSORY NOTE.

See **BILLS, NOTES AND CHECKS**, 1-3, 5, 6.

PROOFS OF LOSS.

See **INSURANCE**, 2-4, 10.

PROXIMATE CAUSE.

See **LIBEL**, 2.

PUBLICATION.

See **EVIDENCE**, 1; **LIBEL**, 2, 3, 6.

PUBLIC MONEY.

See **CONSTITUTIONAL LAW**, 9.

PUBLIC POLICY.

See **RECEIVERS**, 1.

PUNITIVE DAMAGES.

See **LIBEL**, 9, 11.

QUESTION OF FACT.

See **APPEAL**, 6; **CARRIERS**, 1; **CRIMES**, 2; **FACTORY LAW**, 1, 2; **NEGLIGENCE**, 13, 14, 16.

QUESTION OF LAW.

See **APPEAL**, 1, 4, 7, 11, 15; **CRIMES**, 2-4; **EVIDENCE**, 7; **INSURANCE**, 2; **NEGLIGENCE**, 12; **WITNESS**, 2.

RAILROADS.

1. *New York City — Title to Railroad Viaduct Site in Park Avenue — Presumption that Occupation is under the Legal Title.* Where the owner of a tract of land in the city of New York conveyed in 1825 to the city the fee of an avenue, formerly known as Fourth, but now as Park avenue, for street purposes, reserving, however, the trees, buildings and improvements, which avenue had been mapped under chapter 115 of the Laws of 1807, by the city, as well as by the owner, and had been laid down as a street in both maps, but had no actual existence as such until 1850-1853, and he assumed in 1832 to convey by deed a strip 24 feet wide through the center of the avenue to the New York and Harlem Railroad Company during its corporate existence, exclusively for railroad purposes, with the right to slope its embankment to the full width of the avenue, which was then 100 feet, which deed was not recorded until 1835, and of which the city had no actual or constructive notice until 1850-1853, when, upon the opening of the avenue, the corporation received a nominal award for its interest in the fee; and where the corporation had been given the right by the state and city to enter the avenue and use it for the sole purpose of a railroad and lay down its tracks on the said strip under conditions expressly assented to by the company, which gave the city supreme control, contained in two resolutions passed by the common council, one before and the other after its deed from the common grantor, and the latter reciting that the land to be entered upon was owned by the city, and where the corporation had expressly covenanted that it would remove its railroad from the street whenever the city required it, and thereafter entered and successive railroad viaducts were constructed on said strip, upon which it operated and has continued to operate its trains, neither the corporation nor its lessee can assert absolute title to the site of the viaducts, under claim of title exclusive of any other right, as against an abutting owner, who in 1895 acquired a lot upon the avenue between One Hundred and Fourteenth and One Hundred and Fifteenth streets, through *meane* conveyances from the common grantor, prior to his grant to the railroad company, in an action brought by such owner to enjoin as an interference with the appurtenant

RAILROADS — Continued.

easements of light, air and access, the operation of the railroad, and for damages, since, in the absence of any evidence as to character of the original entry by the corporation or the nature of its claim when or after entering, except as may be inferred from the above facts, its entry and occupation must be "deemed to have been made under and in subordination to the legal title" of the city. *Lewis v. N. Y. & Harlem R. R. Co.* 202

2. *Action in Equity by Abutting Owner — Measure of Damages.* Where predecessors in the title have submitted without complaint to the maintenance by a railroad corporation, in the avenue in front of them, of two successive viaducts, each of which occupied its center for more than twenty years to the exclusion of all traffic therefrom, an abutting owner, who purchased, in 1895, while a third and higher viaduct was being constructed, under which the cross streets were carried, and who did not object to it until 1897, is not entitled, when suing in equity for damages to easements of light, air and access, to recover upon the same basis as if the avenue had never been a railroad street, but may recover only the net difference, measured in money, between the effect of the old structure and that of the new, during the period that the latter was in use, after deducting the benefits to access and traffic conferred by it, together with the usual injunction to enforce payment of the damages awarded. *Id.*

3. *Easements — Title by Prescription to Extent of User.* Where two successive railroad viaducts have each stood for more than twenty years, on lands definitely devoted to street purposes, in front of the premises of an abutting owner and her predecessors in the title, and have been used by the railroads continuously, visibly and exclusively, the corporations obtain, by prescription, as against the abutting owner and without liability at law, a right to maintain a viaduct forever within the same limits and at the same height, and, to the extent of the user, an exclusive right to the easements of light, air and access. *Id.*

4. *Higher Viaduct Erected by Governmental Agency — Use of it by Railroads — Time when Liability for Damages begins.* Such corporations cannot be charged with the damages which the easements of an abutting owner suffered from the construction itself, by a governmental agency, of a third and higher viaduct; but where they use it, although by direction of the legislature, they are liable from the commencement of and during the period of such use after action brought, for such damages as the easements suffered from the increased height of the third viaduct, deducting, however, the benefits received from the increased facility of access afforded by the viaduct to the premises and in the locality. *Id.*

5. *Temporary Trestles Encroaching on and Closing Avenue — Damages for Use of them by Railroads.* Where the governmental agency, in constructing the third viaduct, erected temporary trestles, which lay outside of the lines of the former viaducts and substantially closed the avenue to traffic, and the corporations used them, although directed to do so by law, they are absolutely liable, without any deduction, for the damages which the easements of the abutting owner suffered during the period of such use. *Id.*

6. *Abandonment of Prescriptive Right to Maintain Viaduct.* Where railroad corporations have a prescriptive right to maintain in an avenue, a viaduct, its removal by a governmental agency affords no evidence that the corporations intend to abandon their prescriptive right, nor is evidence of such intent afforded by the mere fact that such a viaduct was removed and a similar one immediately constructed upon the same site. *Id.*

7. *New York City — Effect of Fourth Avenue Condemnation Proceedings in 1850-1853.* The condemnation proceedings of 1850-1853, by which Fourth avenue, in the city of New York, was widened, created no new

RAILROADS—Continued.

easements for abutting owners, so far as the original width of the avenue was concerned. *Id.*

8. *Elevated Railroads—Consent of Abutting Owner as an Estoppel.* The written consent of a mere abutting owner to the construction and operation of an elevated railroad in the street in front of his premises is a complete answer to his subsequent action in equity to restrain the operation of the road, and where the trial court, ignoring the consent, awards him damages and the usual injunction, a judgment of reversal below must be affirmed in the Court of Appeals. *Heimbürg v. Manhattan Ry. Co.* 352

9. *Appeal—Change of Position not Permissible.* Where the owner has claimed upon the trial that a written paper was insufficient as a consent, he cannot, after a judgment in his favor has been reversed below, change his position and ask the Court of Appeals to examine the evidence in order that it may find some fact to overcome the paper or answer the decision of reversal. *Id.*

10. *Consent—Not Impaired by Refusal of Necessary Number of Owners.* Where the road has been constructed and is in operation, an abutting owner, who consented to the construction thereof, cannot maintain an action to restrain the operation thereof on the ground that the corporation was forced to procure from the General Term consent to construct for the reason that the necessary number of owners would not consent, as the consents are good as far as they go, and the corporation has a right to insist upon every authority which it had for the construction of the road. *Id.*

See CARRIERS; CONSTITUTIONAL LAW, 1-3, 5; NEGLIGENCE, 1-6.

RAPE.

See CRIMES, 13, 15; EVIDENCE, 6.

REAL PROPERTY.

See TRUSTS, 1, 2.

RECEIVERS.

1. *Foreign Receiver of Non-resident Bank—His Right to Enforce Statutory Liability of Resident Stockholder for the Bank's Debts.* Where the receiver of an insolvent bank of another state, who is also a *quasi* assignee invested with all rights possessed by its creditors and entitled to bring any action involving its property, funds and effects in his hands, these including as an asset the right to enforce a several liability for its debts imposed by a foreign statute upon its stockholders in favor of its creditors, after having had that liability determined as to all the stockholders in a proceeding taken in a foreign court, brings an action in the courts of this state to enforce it against a resident stockholder, who had not been a party to the foreign proceeding, and he has had opportunity here to contest all the essential facts and his exact liability has been here determined on common-law evidence, the Court of Appeals will, in the interests of interstate comity and because the foreign statute prescribed no remedy for the enforcement of the liability, affirm a recovery here by the receiver where the same does not involve any departure from our practice, nor result in injustice to any of our citizens, or conflict with our public policy. *Howarth v. Angle.* 179

2. *Basis of Liability of Resident Stockholder in Foreign Corporation.* The enforcement of a statutory liability against a resident stockholder for debts of an insolvent foreign corporation does not rest upon the theory that the laws of the foreign state are in force in this state, but upon the contractual obligation he assumes to meet the liability affixed by the statute to the ownership of stock. *Id.*

REMEDIES.

See COUNTIES, 2; INDIANS, 2.

RENEWAL.

See INSURANCE, 6.

RENT.

See LANDLORD AND TENANT, 4-6.

RESALE.

See SPECIFIC PERFORMANCE, 3.

REVERSAL.

See APPEAL, 9, 22; CORPORATIONS.

REVISED STATUTES.

1. 1 R. S. 726, §§ 37, 38 — *Trust to Use Rents and Profits to Pay Mortgages, a Trust for Accumulation.* The application of part of the income of a trust estate to the payment of mortgages thereon, thereby increasing the capital of the estate by decreasing the burden thereon, constitutes an accumulation within the meaning of the Revised Statutes (1 R. S. 726, §§ 37, 38) prohibiting the accumulation of rents and profits of real estate, except during the minority and for the sole benefit of minors, and is invalid notwithstanding such accumulation takes the form of an extinguishment of indebtedness, and is limited to the surplus income remaining after the payment of an annuity and restricted to the lifetime of the annuitant. *Hascall v. King.*

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2. 1 R. S. 728, § 55 — *Trust to Lease Real Property for above Purpose Invalid.* The authority to create an express trust to "lease," as well as sell or mortgage real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon, conferred by subdivision 2 of section 55 of the Revised Statutes (Vol. 1, p. 728), now section 76 of the Real Property Law (L. 1896, ch. 547), which defines the purposes for which express trusts may be created, does not authorize the creation of an express trust by will empowering the trustee to take the rents and profits of land and apply them, or part of them, during the lifetime of an annuitant to the payment of mortgages, as this would decrease the burden upon the trust estate and thereby increase the capital thereof in violation of the provisions which prohibit the accumulation of the rents and profits, except during the minority and for the sole benefit of minors. *Id.*

3. 1 R. S. (9th ed.) 2013 — *Liquor Tax Certificate not a Chattel — Assignment thereof need not be Filed as a Chattel Mortgage.* A liquor tax certificate issued under the Liquor Tax Law (L. 1896, ch. 112) is personal property but it is not a chattel within the purview of the Chattel Mortgage Act (1 R. S. [9th ed.] 2013), and a transfer thereof as security for a loan is valid as against a subsequent judgment creditor of the assignor, although not filed as a chattel mortgage. *Niles v. Mathusa.*

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4. 2 R. S. 63, § 40 — *Statute of Wills — Intention of Legislature Govern Construction.* The intention of the legislature, and not that of the testator, must govern the construction of the Statute of Wills (2 R. S. 63, § 40), and, if he fails to execute a will in conformity thereto, the court must condemn the instrument and can give no force to the fact that he honestly intended thereby to make a will. *Matter of Andrews.*

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5. 2 R. S. 727, § 44 — *Tenancy in Common of Personal Property.* Personal property, as well as real estate, is subject to the statutory rule (2 R. S. 727, § 44) that "every estate granted or devised to two or more persons in their own right shall be deemed a tenancy in common unless expressly declared to be in joint tenancy." *Commercial Bank v. Sherwood.*

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RIPARIAN RIGHTS.

See EQUITY.

SAMPLE TRUNK.

See CARRIERS, 1, 2.

SESSION LAWS.

1855, *Ch.* 427. See par. 2, this title.

1868, *Ch.* 734. See par. 6, this title.

1881, *Ch.* 402. See par. 3, this title.

1. 1892, *Ch.* 410 — *New York City — Failure of Board of Education to Appropriate Money for Contract for School Repairs.* The failure of the board of education of the city of New York to make an appropriation, authorized and permitted by the provisions of the Consolidation Act (L. 1892, ch. 410), to pay a contractor for erecting a retaining wall for a public school building, under a contract approved and ratified by the board, does not invalidate such contract and preclude a recovery by the contractor where he performed the work in good faith, without knowledge that the appropriation had not been made, and he had no means, under the statute, of protecting himself against the board's exhausting appropriations available and sufficient, at the time the contract was made, to pay for the work. *Van Dolsen v. Bd. of Education.* 446

1885, *Ch.* 283. See par. 3, this title.

2. 1885, *Ch.* 448 — *State Tax Sale — L. 1885, Ch. 448, Primarily a Statute of Limitation.* Chapter 448 of the Laws of 1885, amending Laws of 1855, chapter 427, section 65 (subsequently re-enacted in part in L. 1891, ch. 217; L. 1893, ch. 711), which makes the comptroller's conveyance executed upon a tax sale conclusive evidence, after the lapse of two years from its record in the county in which the lands conveyed are located, of the regularity of the proceedings in which conveyance was made, although in some aspects a curative statute, is, primarily and essentially, a statute of limitations. *Meigs v. Roberts.* 371

3. *Idem — Ejectment against State Comptroller — Action Barred by Statutory Notice after Two Years.* Where, after the default of the purchaser, at a state tax sale in 1881, of part of a tract of wild, vacant and forest lands in Franklin county, and after the publication of the statutory notice of redemption, the comptroller conveys the whole tract to the state under the statute (L. 1881, ch. 402) by a deed recorded in that county in 1887, and in 1894 duly publishes the statutory notice (L. 1893, ch. 711, § 13) that the lands are thereby declared to be and thereafter shall be deemed to be in his actual possession for the state, the previous owner of the fee of the whole tract, failing to prove any actual possession in himself or his grantors, cannot, in 1897, maintain an action for ejectment against the comptroller, although the notice of redemption published by the comptroller stated that only part of the tract was unredeemed, as such action is barred by the lapse of more than two years since the publication of the statutory notice (L. 1885, ch. 448, as re-enacted L. 1893, ch. 711); and by the statute (L. 1885, ch. 283) the People of the state acquired not only constructive, but actual, possession of the lands conveyed by the comptroller's deed. *Id.*

4. 1886, *Ch.* 409 — *Factory Law Construed.* The manifest purpose of the Factory Law (L. 1886, ch. 409, as amd. by L. 1892, ch. 673) was to give more force to the existing rule that masters should afford a reasonably safe place for their servants to work; not that every piece of machinery should be covered or guarded, but that those parts of the machinery which are dangerous to the servants whose duty requires them to work in its immediate vicinity should be properly guarded; nor does the statute attempt to specify how machinery shall be guarded otherwise than as "properly guarded," which in each case is a question of fact depending upon the situation, nature and dangerous character of the machinery. *G. F. P. C. Co. v. Travelers' Ins. Co.* 399

5. *Idem — Violation of Factory Law a Question of Fact.* A setscrew projecting about five-eighths of an inch from a collar at one end of a revolving shaft which is from fifteen to eighteen feet above the floor of a factory, out of reach of employees engaged in operating the machinery, and reached only by a ladder, by which it is approached only for the pur-

SESSION LAWS — Continued.

pose of oiling the bearing, does not, as matter of law, violate the Factory Law, but the necessity for a guard in such a case is a question of fact. *Id.*

6. 1889, *Ch. 161 — Liability for Destruction of Oyster Bed by the Discharge of Sewage Thereon.* A right to plant an oyster bed under public waters within the town of Flatbush, and gather oysters therefrom, acquired under the statute (L. 1868, ch. 734), is private property, and the destruction of the bed by sewage discharged thereon from a sewer of the town is a direct invasion of a private right and taking of private property within the meaning of the Constitution, although the sewer was constructed by the town under legislative authority (L. 1889, ch. 161); and the city of Brooklyn, having succeeded to the property and liabilities of the town, is liable in an action for damages for such injury. *Huffmire v. City of Brooklyn.* 584

7. 1890, *Ch. 565 — Railroad Law — Omission to Comply with Statute Relating to Signboards.* A railroad corporation is not entitled to a charge, in an action brought by one who was injured at a railroad crossing which he had never seen before, that no negligence can be imputed to the corporation by reason of the size or shape of the danger signal at the crossing, or the language of the warning to the public, or the length of its letters — these failing to comply with the Railroad Law (L. 1890, ch. 565, § 33) — as, in the case of one who is a stranger to the crossing, a failure in such respects might constitute actionable negligence, and justify a recovery when the injury was caused by a disregard of the statute. *Lewis v. L. I. R. R. Co.* 582

1891, *Ch. 217.* See par. 2, this title.

1892, *Ch. 673.* See pars. 4, 5, this title.

8. 1892, *Ch. 686 — County Law — Voluntary Payments.* A mere volunteer, having no interest in the property, who pays state and county taxes upon assessments of real property void on their face, without any effort having been made to collect them, is not entitled to have the same refunded upon an application, in his own name, under section 16 of the County Law (L. 1892, ch. 686), as the section does not apply to taxes voluntarily paid, but to those collected under compulsion of law. *Matter of McCue v. Bd. Suprs.* 235

9. 1892, *Ch. 688, § 48 — Stock Corporation Law — Judgment Suffered by an Officer with Intent to Prefer a Creditor — Review of Order of Reversal not Stated to be upon the Facts.* Where, in an action brought by a receiver of a corporation, appointed in proceedings for its dissolution, to set aside a judgment recovered against it, by default, as violative of the provisions of the Stock Corporation Law (L. 1892, ch. 688, § 48), avoiding a judgment suffered by an officer of an insolvent corporation with intent to prefer a creditor, it appears both from the testimony of the creditor and that of the bookkeeper of the corporation, with its books before him, that, although the creditor had been for a year or more in the invariable habit of selling goods to the corporation on a credit of from two to four months, he sold it goods, as testified to by him and by the president of the corporation, upon the terms of immediate payment, five days before the corporation admitted its insolvency by its petition in the proceedings for a voluntary dissolution, and that, four days thereafter, he recovered, by the consent of the president, and under direction of the attorneys of the corporation in the dissolution proceedings, the judgment in question, a finding by the trial court that the purchase price of the goods was not due when the action was brought, and that both the creditor and the president knew it, should be sustained, and, with other facts in the case, justifies the inference that the judgment was suffered by the president "with the intent of giving a preference over other creditors," and where a reversal by the Appellate Division of said finding and the judgment in favor of plaintiff is not stated to have been made upon

SESSION LAWS — *Continued.*

the facts, it must be presumed to have been upon the law, and, there being sufficient evidence to sustain the finding, the Court of Appeals may reverse the judgment as founded upon an error of law. *Speltman v. Looschen*. 268

10. 1892, *Ch.* 690 — *Insurance Law* — *Loan below Statutory Standard Made by a Domestic Insurance Company not a Defense to Mortgagor.* An offer of a mortgagor to prove, under his answer in foreclosure, that at the time the mortgagee, a domestic insurance company, made him the loan on his premises they were incumbered and were not worth fifty per centum more than the loan, presents no defense to the action, although the Insurance Law (L. 1892, ch. 690, § 13, amd. L. 1893, ch. 112, amd. L. 1893, ch. 725, § 16), in the interest of policyholders, prescribes that standard for such loans, as the statute does not expressly prohibit such a corporation from investing in anything except insurance stocks; and no implication that an investment below the standard is prohibited by the statute and is, therefore, void, should be imported to assist the borrower to escape payment. *Washington L. Ins. Co. v. Clasen*. 305

1893, *Ch.* 112. See par. 10, this title.

1893, *Ch.* 711. See pars. 2, 3, this title.

1893, *Ch.* 725. See par. 10, this title.

11. 1894, *Ch.* 356 — *Parties.* The town of Flatbush, by chapter 356 of the Laws of 1894, having been merged in the city of Brooklyn, the city is a proper party defendant to any action which might have been brought against the town before the merger. *Huffmire v. City of Brooklyn*. 584

12. 1895, *Ch.* 771 — *Constitutional Law* — *Corporations, When Charitable.* A charitable institution, within the meaning of sections 11 to 14 of article 8 of the Constitution, chapter 771 of the Laws of 1895, and chapter 546 of the Laws of 1896, giving to the state board of charities the right of visitation with respect to all charitable institutions, is one that in some form or to some extent receives public money for the support and maintenance of indigent persons, and by public money is meant money raised by taxation not only in the state at large, but in any city, county or town. *People ex rel. Bd. Charities v. N. Y. Soc. P. C. C.* 429

13. 1895, *Ch.* 1027 — *Mileage Book Act* — *Constitutional as to Subsequent Corporations.* The Mileage Book Act (L. 1895, ch. 1027), although declared by the Supreme Court of the United States unconstitutional as to railroad corporations theretofore incorporated, is constitutional as to a railroad corporation thereafter incorporated in the State of New York, and whose franchises and property rights, so far as the record shows, have accrued subsequent to the enactment of the statute. *Purdy v. Erie R. R. Co.* 42

14. *Idem* — *Unconstitutional as to Existing Corporations.* The Mileage Book Act (L. 1895, ch. 1027), requiring railroad companies to issue mileage books under a penalty for refusal to do so, is unconstitutional as to corporations existing at the time of its enactment, since the statute is an illegal invasion of the property rights of such corporations, as declared by a decision of the United States Supreme Court. *Beardley v. N. Y., L. E. & W. R. R. Co.* 230

15. 1896, *Ch.* 112 — *Liquor Tax Law* — *Liquor Tax Certificate not a Chattel* — *Assignment thereof need not be Filed as a Chattel Mortgage.* A liquor tax certificate issued under the Liquor Tax Law (L. 1896, ch. 112) is personal property, but it is not a chattel within the purview of the Chattel Mortgage Act (1 R. S. [9th ed.] 2013), and a transfer thereof as security for a loan is valid as against a subsequent judgment creditor of the assignor, although not filed as a chattel mortgage. *Niles v. Mathusa*. 546

16. *Idem* — *Estoppel.* An assignee of a liquor tax certificate, who allows it to remain in the hands of the assignor, is not thereby estopped from

SESSION LAWS — Continued.

setting up title thereto as against a subsequent judgment creditor of the assignor; and, although such creditor is entitled to reach, through a receiver in supplementary proceedings, the assignor's interest in such certificate, subject to the provisions of the Liquor Tax Law, he stands in no different or better position than if he were a subsequent assignee of the certificate as security for his debt. *Id.*

1896, *Ch. 546.* See par. 12, this title.

17. 1896, *Ch. 547 — Real Property Law — Invalid Trust.* The authority to create an express trust to "lease," as well as sell or mortgage real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon, conferred by subdivision 2 of section 55 of the Revised Statutes (Vol. 1, p. 728), now section 76 of the Real Property Law (L. 1896, ch. 547), which defines the purposes for which express trusts may be created, does not authorize the creation of an express trust by will empowering the trustee to take the rents and profits of land and apply them, or part of them, during the lifetime of an annuitant to the payment of mortgages, as this would decrease the burden upon the trust estate and thereby increase the capital thereof in violation of the provisions which prohibit the accumulation of the rents and profits, except during the minority and for the sole benefit of minors. *Hascall v. King.* 184

18. 1896, *Ch. 835 — Burdens not Increased by.* The amendment to the Mileage Book Act of 1895 (L. 1896, ch. 835) did not increase the burdens of railroad corporations, and hence the amendment is constitutional in all cases where the original act would be upheld. *Purdy v. Erie R. R. Co.* 42

19. 1898, *Ch. 125 — Liquor Tax Law — Disposition of Revenue — Poor Fund.* The requirement of chapter 125 of the Laws of 1898 (a local statute for the benefit of the poor of the town of Plattsburgh), that "all" excise money arising from licenses granted in such town shall be deposited with the treasurer of the poor fund, is limited to the two-thirds which the Liquor Tax Law apportions to the town, and does not embrace the one-third which, by the terms of that law, is required to be paid to the state. *People ex rel. Town of Plattsburgh v. Williams.* 240

SHERIFFS.

See HABEAS CORPUS.

SIGNBOARDS.

See NEGLIGENCE, 5.

SOUTHAMPTON (TOWN OF).

1. *Right to Make a Roadway across Great South Bay is a Franchise.* The right, created by a resolution of the trustees of the town of Southampton, vested by royal charters granted in colonial days, with title and sovereignty over the waters of Great South Bay, in that town, and the lands thereunder, authorizing a riparian proprietor "to make a roadway and to erect a bridge" across the bay, the said bridge to be a drawbridge, and providing that there shall be no unnecessary delay to those navigating the waters of the bay, is a franchise, as distinguished from a license or an easement. *Trustees of Southampton v. Jessup.* 122

2. *Character of Roadway Authorized by Grant.* Any reasonable and ordinary roadway, such as a solid embankment of earth, is authorized by such a resolution, as a roadway to be made over lands under water includes more than a mere right of way, and of necessity contemplates a structure resting on the land and extending above the water, and, in the absence of specifications in the grant, confers upon the grantee of the franchise the right to make it out of the materials in common use for the construction of roads, such as earth and stone. *Id.*

SOUTHAMPTON (TOWN OF) — Continued.

3. *Erection of Temporary Structure.* The grantee of the franchise under such resolution waives no right by building a temporary structure in the first instance. *Id.*

SPECIAL PROCEEDING.

See APPEAL, 21.

SPECIAL VERDICT.

See APPEAL, 17.

SPECIFIC PERFORMANCE.

1. *Contract — Subject-matter Not Identified.* Specific performance of a contract for the purchase of bark cannot be ordered when the bark to be delivered on the contract is an unascertained and unidentified portion of a larger quantity. *Lighthouse v. Third Nat. Bank.* 336

2. *Lien or Equity of Purchaser in Case of Unidentified Property.* The use of part of the proceeds of notes given on the purchase of a specified quantity of bark, to pay, without the purchaser's knowledge or direction, certain "peeling" charges on bark of a third party who, by an independent contract with the seller had agreed to deliver to the purchaser the agreed quantity of bark, when that has not been ascertained or identified, but remains part of a greater quantity, does not create any lien upon or equity in the bark in favor of the original purchaser, as against a subsequent purchaser from the third party, who takes it only for an antecedent indebtedness; but the transfer is simply a preference of one creditor over another. *Id.*

3. *Contract Made by Executors under Power of Sale — Parties — Resale by Referee.* Executors, having an unqualified and imperative power to sell and convey real estate and convert it into cash for the purpose of dividing the same among legatees, have power to make a contract of sale and enforce such contract by an action for specific performance against a purchaser, without making the beneficiaries parties, and in such action the court has power to adjudge a resale by a referee with a personal judgment for any deficiency against the defendant, and the deed of the referee to a purchaser at such sale conveys all the title the executors had under their power of sale and the purchaser must accept it. *Strauss v. Bendheim.* 462

STANDARD POLICY.

See INSURANCE, 1-3.

STATE BOARD OF CHARITIES.

See CONSTITUTIONAL LAW, 9, 10.

STATE COMPTROLLER.

See TAX, 3, 4.

STATE INSPECTION.

See CONSTITUTIONAL LAW, 10.

STATE TAX SALE.

See TAX, 3, 4.

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STOCKHOLDERS.

See RECEIVERS.

STREET RAILROADS.

See NEGLIGENCE, 8.

SUBSCRIPTION.

See WILL, 2.

SUPERVISORS (BOARD OF).

See COUNTIES, 2.

SUPPLEMENTARY PROCEEDINGS.

See EXCISE, 3.

SURETY COMPANIES.

See PRINCIPAL AND SURETY, 1.

SURRENDER.

See LANDLORD AND TENANT, 2, 3.

SURROGATES.

Ancillary Letters Testamentary—Jurisdiction of Surrogate—Collateral Attack. Ancillary letters granted by a surrogate in case of a will of personal property, upon a petition stating that the will was executed in Louisiana, while an accompanying transcript of the record of probate in Louisiana clearly shows that the will was executed in the state of Alabama, and that the testatrix resided in that state at the time of her death, are subject to collateral attack for want of jurisdiction, since the power of the surrogate, under section 2895 of the Code of Civil Procedure, to grant ancillary letters upon a foreign probate of a will of personal property made by a non-resident, is limited to the case of probate in the state or territory where the will was executed or where the testator resided at the time of his death. *Taylor v. Syme.* 513

See APPEAL, 5, 6; EXECUTORS AND ADMINISTRATORS, 1.

TAX.

1. *Assessment against Estate.* An assessment of land for taxation in the name of the "estate" of a certain person, without any qualifying or additional description, is void on its face. *Matter of McCue v. Bd. Suprs.* 235

2. *Voluntary Payments.* A mere volunteer, having no interest in the property, who pays state and county taxes upon assessments of real property void on their face, without any effort having been made to collect them, is not entitled to have the same refunded upon an application, in his own name, under section 16 of the County Law (L. 1892, ch. 686), as the section does not apply to taxes voluntarily paid, but to those collected under compulsion of law. *Id.*

3. *State Tax Sale—L. 1885, Ch. 448, Primarily a Statute of Limitation.* Chapter 448 of the Laws of 1885, amending Laws of 1855, chapter 427, section 65 (subsequently re-enacted in part in L. 1891, ch. 217; L. 1898, ch. 711), which makes the comptroller's conveyance executed upon a tax sale conclusive evidence, after the lapse of two years from its record in the county in which the lands conveyed are located, of the regularity of the proceedings in which conveyance was made, although in some aspects a curative statute, is, primarily and essentially, a statute of limitations. *Meigs v. Roberts.* 371

4. *Ejectment against State Comptroller—Action Barred by Statutory Notice after Two Years.* Where, after the default of the purchaser, at a state tax sale in 1881, of part of a tract of wild, vacant and forest lands in Franklin county, and after the publication of the statutory notice of redemption, the comptroller conveys the whole tract to the state under the statute (L. 1881, ch. 402) by a deed recorded in that county in 1887, and in 1894 duly publishes the statutory notice (L. 1893, ch. 711, § 18) that the lands are thereby declared to be and thereafter shall be deemed to be in his actual possession for the state, the previous owner of the fee of the whole tract, failing to prove any actual possession in himself or his grantors, cannot, in 1897, maintain an action for ejectment against the comptroller, although the notice of redemption published by the comptroller stated that only part of the tract was unredeemed, as such action is barred by the lapse of more than two years since the publication of the statutory notice (L. 1885, ch. 448, as re-enacted L. 1893, ch. 711); and by

TAX—*Continued.*

the statute (L. 1885, ch. 288) the People of the state acquired not only constructive, but actual, possession of the lands conveyed by the comptroller's deed. *Id.*

5. *Illegal Apportionment of Assessment.* Where the assessors of the city of Buffalo for the purposes of general taxation divided a piece of real property into two parts and mapped it in that form, and the city comptroller apportioned the whole of a local assessment upon one part only and in that form sent it to the collector, who returned it without collection to the comptroller, who then discovered the error and corrected it by spreading the assessment upon the whole, instead of one part of the property, such action is a material departure from the provisions of the statute and permits the owner to question a sale of her property subsequently made by the municipal authorities for non-payment of the assessment. *Brennan v. City of Buffalo.* 491

6. *Unauthorized Addition to Legal Assessment Rejected—Excess of Jurisdiction.* An addition made by such board of city assessors to a taxpayer's lawful and ratable assessment, to bring the total expense of a local improvement up to a sum which, under the charter of the city, would permit payment of it to be made in five annual installments, is an illegal and arbitrary act without authority or jurisdiction, but does not render the whole assessment void; and where the illegal part of such an assessment can be separated from the legal, the latter part may stand and be enforced, although the act of the assessors be characterized by the findings of the Special Term as "fraudulent." *Id.*

7. *Action to Set Aside Assessment Distinguished from one to Set Aside the Sale.* A provision of a city charter, barring an action to set aside, or test the validity or regularity of a tax or assessment unless brought within one year from the completion and delivery of the roll, does not apply to an action to set aside a sale of the property upon which the assessment was imposed. *Id.*

8. *Relief in Action to Set Aside Sale.* Where the court has obtained jurisdiction of the parties and of the subject-matter in an action brought to set aside such a sale, it may, when setting the sale aside, afford complete relief, by striking from the roll a separate item added without jurisdiction to a valid assessment. *Id.*

TENANCY IN COMMON.

See PERSONAL PROPERTY.

TIME.

See RAILROADS, 4; VENDOR AND PURCHASER, 1, 4.

TITLE.

See RAILROADS, 8; VENDOR AND PURCHASER, 1, 4.

TRANSFER TAX.

See APPEAL, 6.

TRIAL.

1. *Direction of Verdict.* Where, after a nonsuit has been denied at the close of the whole case, the counsel for the plaintiff states that he is willing to leave it to the court, and the defendant's counsel, upon being interrogated by the court, says he has no question to submit to the jury, but that he "stands on" his motion for a nonsuit, the legal effect is the same as if both counsel had requested the court to direct a verdict; and where a verdict has been directed in favor of the plaintiff, although the defendant excepted thereto, all the controverted facts and all inferences in support of the judgment entered thereon will be deemed conclusively established in his favor. *Trimble v. N. Y. C. & H. R. R. Co.* 84

2. *Withdrawal of Instruction to Jury.* An instruction to the jury, that they will find whether there is any substance to a defense or whether it is sham, may be treated as withdrawn, and not merely restated, when the

TRIAL — Continued.

judge, on his attention being called to it, says: "I withdraw that. I submitted the question whether it is a real, good, substantial defense or whether it was sham." *Desmond-Dunne Co. v. Friedman-Doscher Co.* 486

8. *Instruction as to Hypothesis of Guilt — Improper Qualification of Requested Charge.* The refusal to grant a requested charge that the evidence, in order to convict, must be so strong as to remove every other hypothesis than that of the defendant's guilt, followed by a charge that "it must be sufficient to remove every reasonable hypothesis," is error, because the jury may have understood that the evidence need not be so strong as to remove to a moral certainty every other hypothesis than that of the defendant's guilt or every reasonable hypothesis of his innocence. *People v. Smith.* 520

4. *Improper Statement of District Attorney.* A statement by the district attorney in his opening that he would show, if permitted, that several other buildings owned by the mother and family of the defendant and other buildings which he had assisted in erecting or was interested in were destroyed in a similar manner, with an incomplete statement as to what had happened within less than a year before the fire, which he refrained from finishing after an objection was taken but overruled by the court, constitutes prejudicial error, since the jury, after the court overruled the objection, may have understood that the district attorney was speaking within proper limits and may have inferred that they were dealing with an old offender. *Id.*

See **BILLS, NOTES AND CHECKS**, 2-5; **CRIMES**, 1-4, 11-14, **NEGLIGENCE**, 10.

TRUSTS.

1. *Trust to Use Rents and Profits to Pay Mortgages, a Trust for Accumulation.* The application of part of the income of a trust estate to the payment of mortgages thereon, thereby increasing the capital of the estate by decreasing the burden thereon, constitutes an accumulation within the meaning of the Revised Statutes (1 R. S. 726, §§ 87, 88) prohibiting the accumulation of rents and profits of real estate, except during the minority and for the sole benefit of minors, and is invalid notwithstanding such accumulation takes the form of an extinguishment of indebtedness, and is limited to the surplus income remaining after the payment of an annuity and restricted to the lifetime of the annuitant. *Haseall v. King.* 184

2. *Trust to Lease Real Property for above Purpose Invalid.* The authority to create an express trust to "lease," as well as sell or mortgage real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon, conferred by subdivision 2 of section 55 of the Revised Statutes (Vol. 1, p. 728), now section 76 of the Real Property Law (L. 1896, ch. 547), which defines the purposes for which express trusts may be created, does not authorize the creation of an express trust by will empowering the trustee to take the rents and profits of land and apply them, or part of them, during the lifetime of an annuitant to the payment of mortgages, as this would decrease the burden upon the trust estate and thereby increase the capital thereof in violation of the provisions which prohibit the accumulation of the rents and profits, except during the minority and for the sole benefit of minors. *Id.*

3. *Primary Object of Trust Sustained although Secondary Object Invalid.* The primary object of a testamentary trust being to provide an annuity for testator's wife, and being separable from a secondary object and ulterior provision for the payment of mortgages out of any income remaining after paying such annuity, is valid and will be sustained although the secondary provision be void. *Id.*

See **HUSBAND AND WIFE**, 4.

UNANIMOUS DECISION.

See **APPEAL**, 1, 4, 15.

UNITED STATES STATUTES AT LARGE.

1. *13 U. S. Statutes at Large, 110 — National Bank — Not Entitled to an Equitable Lien upon its Own Shares, Transferred by its Debtor to a Bona Fide Purchaser.* A national bank, incorporated under the National Banking Act of 1864 (13 U. S. Statutes at Large, 110), is not entitled, as against a bona fide purchaser, to an equitable lien upon its shares of capital stock for a debt which the stockholder had previously incurred to the bank, although a notice printed upon their face, based upon a by-law of the bank, prohibited any transfer without the consent of the directors, by any stockholder liable to the bank as a debtor, and declared such liability to be a lien upon the stock, inasmuch as the act prohibits loans by the bank upon the security of its own shares, and thus renders any by-law in contravention thereof, or any statement based thereon, inoperative. *Buffalo Ger. Ins. Co. v. Third Nat. Bank.* 168

2. *Idem — Distinction between Executed and Executory Contracts.* Whatever force may have been given, in the case of executed contracts, to the doctrine that only the government can, by charter proceedings, question a transaction between a national bank and its debtor, violative of the provisions of the Banking Act, that doctrine can have no force in a case where such a bank is seeking to create, as against a third person who is a bona fide purchaser of its shares, a lien based upon an implied executory contract, and in face of a statutory provision that the bank shall not have such a lien or take such a security. *Id.*

UNLAWFUL DIVERSION.

See BONDS, 2.

USE AND OCCUPATION.

See LANDLORD AND TENANT, 6.

USER.

See RAILROADS, 3.

VENDOR AND PURCHASER.

1. *Defect in Title — Waiver of, by Vendee.* A waiver of a defect in the title of land by a vendee who had made a contract for its purchase several months before, but by decision of a court on agreed facts has been relieved from his obligation to take the land, must be deemed to relate back to the time when the contract was required to be completed and stand as of that date, so as to make him liable for the expense of preserving the property in the meantime, though he had not been in possession of it. *Steiner v. Fourth Presbyterian Church.* 322

2. *Specific Performance of Contract Made by Executors under Power of Sale — Parties — Resale by Referee.* Executors, having an unqualified and imperative power to sell and convey real estate and convert it into cash for the purpose of dividing the same among legatees, have power to make a contract of sale and enforce such contract by an action for specific performance against a purchaser, without making the beneficiaries parties, and in such action the court has power to adjudge a resale by a referee with a personal judgment for any deficiency against the defendant, and the deed of the referee to a purchaser at such sale conveys all the title the executors had under their power of sale and the purchaser must accept it. *Strauss v. Bendheim.* 469

3. *Deed of Referee Pursuant to Power of Sale.* Where the recitals in the referee's deed show that it purports to convey the title of the testatrix through the power given by her will as it had been determined by the court, the validity of the deed is not affected by the fact that it conveyed all the right, title and interest of the executors and of the original purchaser at the time of the entry of the judgment, as the executors had a right under the power and the purchaser had an equitable title. *Id.*

4. *Infants' Real Estate — Sale by Special Guardian to his Wife — Marketable Title.* The conduct of a special guardian of infants in selling

VENDOR AND PURCHASER— *Continued.*

their real estate to his wife is not to be commended; but where it appeared that the sale was confirmed by the court in which the proceeding was instituted, with full knowledge upon its part of all the facts, the title cannot, after the lapse of twenty-six years and long after all of the infants have become of age, be questioned. *Id.*

VERDICT.

See TRIAL, 1.

VOLUNTARY CONFESSIONS.

See CRIMES, 3.

VOLUNTARY PAYMENTS.

See TAX, 2.

WAIVER.

See APPEAL, 12; INSURANCE, 2, 4, 10; PRINCIPAL AND SURETY, 1; SOUTHAMPTON (TOWN OF), 3; VENDOR AND PURCHASER, 1.

WILL.

1. *Statute of Wills — Intention of Legislature Governs Construction.* The intention of the legislature, and not that of the testator, must govern the construction of the Statute of Wills (2 R. S. 63, § 40), and, if he fails to execute a will in conformity thereto, the court must condemn the instrument and can give no force to the fact that he honestly intended thereby to make a will. *Matter of Andrews.* 1

2. *When not Subscribed at the End.* A will, drawn upon a printed blank folded in the middle so as to make four consecutive pages, with the attestation clause at the top of the second page and executed at that point by the testator and the attesting witnesses, so that the first two pages together make a complete will, is not subscribed by the testator "at the end of the will," as required by statute, where the third page contains further material and complete dispositions of property in no manner connected with the first or second pages except that the third page is numbered "2nd page" and the second page "3rd page" — the draftsman having passed to the third page after he had filled the first. *Id.*

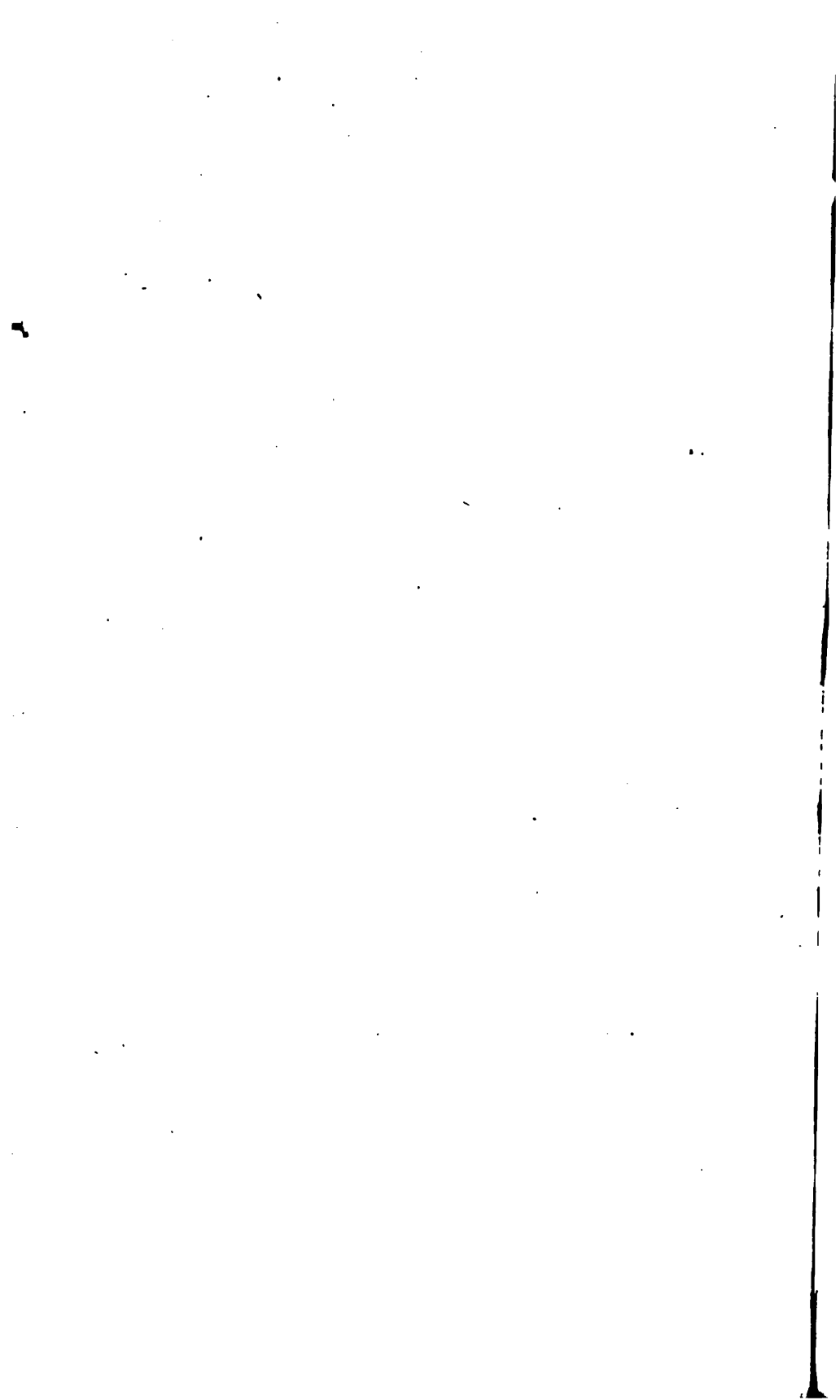
3. *Doctrine of Incorporation Limited.* The doctrine of incorporation cannot be successfully invoked to read into such a will the alleged second page, as the result would be to permit an evasion of the statute. *Id.*

WITNESS.

1. *Credibility.* Where the insurer and its agents assume the position that the policy in suit had lapsed before the loss occurred, the insured may, for the purpose of attacking the credibility of the agents sworn upon the trial, ask them on cross-examination whether they have not stated, in substance, to third parties that they thought the loss would be adjusted and paid and that the insured would not lose the amount, and, in case of their denial, the insured may show that they had made such statements. *Squier v. Hanover F. Ins. Co.* 552

2. *When Credibility of Party is a Question of Law.* The rule that the credibility of a witness who is a party to the action must be submitted to the jury is not an absolute and inflexible one, and where his evidence is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and is not improbable, nor in its nature surprising or suspicious, there is no reason for denying to it conclusiveness; hence, where one of the defendants, in an action for goods sold, testified that the contract was entire and had been performed only in part, and his testimony is not contradicted or discredited, a verdict in their favor is properly directed by the trial court. *Hull v. Littauer.* 569

See EVIDENCE, 13.



TABULAR LIST OF OPINIONS.

PARKER, Ch. J. 35 (Executors' commissions); 81 (Lease; failure to repeat exception); 138 (Trust for accumulation); 287 (Fire insurance); 348 (Stipulated test of machinery); 534 (Rape); 578 (Life insurance; ambiguous policy).

GRAY, J. 32 (Executors' commissions); 168 (National bank); 315 (Appeal; transfer in fraud of creditors); 412 (Foreign decree for alimony; constitutional law); 570 (Credibility of party).

O'BRIEN, J. 94 (Liability of railroad for loss of sample trunk; direction of verdict); 253 (Appeal); 273 (Rape; corroboration); 279 (Injunction against diversion of stream); 331 (Interest); 354 (Elevated railroad); 424 (Interest on advances by partner); 430 (Charitable corporations); 493 (Assessment and taxation); 505 (Appeal; alimony).

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HAIGHT, J. 239 (Appeal); 242 (Liquor Tax Law); 282 (Appeal; brokers' commissions); 324 (Vendor and purchaser; waiver of defect in title); 328 (Interest); 401 (Factory Law construed); 445 (Appeal); 454 (Contract of employment for life); 472 (Specific performance; marketable title); 500 (Appeal; evidence of fraud).

MARTIN, J. 15 (Libel); 26 (Negligence); 56 (Negligence); 102 (Libel); 132 (Presumptions); 196 (Negligence); 258 (Negligence); 266 (Appeal); 457 (Appeal).

VANN, J. 21 (Libel); 125 (Southampton, town of; franchise); 153 (Trust for accumulation); 159 (Libel); 185 (Right of foreign receiver to sue in state of New York); 218 (Harlem railroad; viaduct in Park avenue); 234 (Mileage Book Act); 246 (Appeal; surety companies); 261 (Appeal).

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CULLEN, J. 46 (Mileage Book Act); 106 (Ante-nuptial settlement); 232 (Mileage Book Act); 375 (State tax sale); 383 (Negligence); 565 (Liability of counties for nuisance); 582 (Fire insurance; waiver).

WERNER, J. 302 (Fire insurance); 340 (Specific performance); 359 (Murder; admissibility of confessions); 394 (Lease); 575 (Life insurance; ambiguous policy); 585 (Liability for destruction of oyster bed).

PER CURIAM. 236 (Tax; voluntary payment); 546 (Allowance to counsel on appeal in capital case).



